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IN THE

Supreme Court of the United States

JUNE CARABELL; KEITH CARABELL;
HARVEY GORDENKER; FRANCES GORDENKER,
PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL AGENCY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the "waters of the United States?"

2. Do the limits on Congress' authority to regulate interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the "waters of the United States?"

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PETITION FOR WRIT OF CERTIORARI

June Carabell, Keith Carabell, Harvey Gordenker and Frances Gordenker respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 391 F.3d 704 (6th Cir. 2004), Appendix 1a-13a. The order of the district court, Appendix 15a-17a, which adopts and incorporates the report and recommendation of the magistrate judge, Appendix 20a-57a, was reported at 257 F. Supp. 2d 917 (E.D. Mich. 2003). The decision of the United States Army Corps of Engineers (the Corps) on Petitioners' administrative appeal was not published but is attached as Appendix 58a-68a. The Corps' initial administrative decision was not published but is attached as Appendix 69a-76a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 27, 2004. That court's denial of the Petition for Rehearing En Banc was entered on January 10, 2005, Appendix 18a-19a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The United States Constitution provides that Congress has the authority to "regulate commerce . . . among the several states." Art. I, § 8, cl. 3.

The Clean Water Act (CWA) provides, in relevant part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a)).

> (7) The term "navigable waters" means the waters of the Untied States, including territorial seas.

33 U.S.C. § 1362(7) (CWA § 502(7)).

Federal regulations define "waters of the United States" as:

> (1) All waters which are currently used, or were used in the past, or may be

susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. § 328.3(a).

INTRODUCTION

In *Solid Waste Agency of Northern Cook Cty v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*), this Court held that federal authority under § 404(a) of the Clean Water Act (CWA or Act), 86 Stat. 884, as amended, 33 U.S.C. § 1344(a), extends only to waters or wetlands that have a "significant nexus" with the navigable waters of the United States. *SWANCC*, 531 U.S. at 167. Since that decision, federal courts have struggled to define the precise nature of that "significant nexus," especially with respect to wetlands that are adjacent to waters covered by the Act. In this case, the Sixth Circuit has issued an opinion defining the scope of federal authority over adjacent wetlands that fundamentally departs from the principle that this Court set forth in *SWANCC*, as well as from the decisions of the overwhelming majority of federal circuit and district courts.

Petitioners own a parcel of land (the Property) that includes a wetland, which has no surface or ground water connection with any "waters of the United States." The lower courts held that the Property was subject to federal authority, rejecting Petitioners' contention that a "significant nexus" between a water

and a wetland exists where there is, at a minimum, a hydrological connection.

The lower courts rulings' conflict with the overwhelming majority of federal courts, which have held that that there is no "significant nexus" between a wetland and a navigable water in the absence of a hydrological connection. In *SWANCC*, this Court emphasized that the scope of federal authority under the Act was ultimately defined by the Act's expressed purpose of restoring and maintaining "the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (quoted in *SWANCC*, 531 U.S. at 166). On this basis, *SWANCC* held that the Act could not be interpreted to support a regulation, the "Migratory Bird Rule," that purported to extend federal authority over isolated, intrastate ponds. The majority of federal courts have recognized that, under this principle, the Act cannot be extended to hydrologically isolated wetlands.

In the alternative, to the extent that the Corps' interpretation of the intended scope of the Act is correct, this Court's recent Commerce Clause jurisprudence prohibits such an expansive exercise of federal authority. Allowing federal jurisdiction over isolated intrastate wetlands significantly intrudes upon the states' traditional position as the primary source of authority for the regulation of land and water use, and this Court should hold that the Act exceeds Congress' authority under the Commerce Clause insofar as it permits the regulation of hydrologically isolated wetlands, such as the wetland on the Property.

Resolving the conflict in this case by explicating the concept of "significant nexus" will also contribute to the resolution of another conflict among the circuits regarding whether the "significant nexus" requirement limits federal authority to wetlands that are adjacent to navigable waters or to wetlands, such as the one in this case, that are adjacent to a non-navigable tributary of a navigable water. *See* Appendix at 10a (citing cases). When the conflict created in this case is viewed in light of this other, conceptually similar conflict about federal authority over "adjacent wetlands," it is clear that the federal courts require this Court's further guidance about the precise nature of the "significant nexus" requirement described in *SWANCC*.

STATEMENT OF THE CASE

The Property is 19.6 acres of land in Chesterfield Township, Macomb County, Michigan, about a mile from Lake St. Clair. *See* Appendix at 2a. Approximately fifteen acres of the Property are forested wetlands. *Id.* A drainage ditch is located on an adjacent parcel and is near one of the borders of the Property. Appendix at 2a-3a. A berm runs along the side of the ditch, forming a barrier between the Property and the ditch and preventing water from the Property from draining into the ditch. Appendix at 3a. The berm was apparently formed more than fifty years ago by the side casting of spoils during the excavation of the ditch. Appendix at 62a. There is no dispute in the administrative record that surface water does not flow between the Property and the ditch. *See* Appendix at 3a. Similarly, there is no dispute that there is no groundwater connection between the Property and the ditch. *See* Appendix at 52a. The ditch

intersects with the Sutherland-Oemig Drain, which empties into Auvase Creek, which flows into Lake St. Clair. Appendix at 3a. Petitioners seek to use the Property for the construction of a condominium complex. Appendix at 2a.

A. The Administrative Decisions

After the Michigan Department of Environmental Quality (MDEQ) issued a permit authorizing Petitioners' project, Respondent United States Environmental Protection Agency (EPA), acting pursuant to § 404(a) of the Clean Water Act, 33 U.S.C. § 1344, objected to the issuance of the state permit and required Petitioners to file an application for a federal permit to fill the wetland. Appendix at 4a. The EPA also authorized the Corps to rule on the application. *Id.* The Corps denied the application, finding that the wetland on the Property was part of the Lake St. Clair watershed and therefore that the wetland was governed by the Act. Appendix at 69a-76a. This decision was affirmed through the Corps' internal administrative appellate process. Appendix 58a-68a.

B. The District Court Decision

Petitioners challenged the Corps' decision in the district court. Ruling on the parties' cross-motions for summary judgment, the district court adopted the report and recommendation of a magistrate judge and ruled that the Corps was correct in asserting jurisdiction over the wetland. Appendix at 20a-57a. The district court acknowledged that, in *Solid Waste Agency of Northern Cook Cty. v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*), this

Court had ruled that the Act regulated only those waters that had a "significant nexus" with the "waters of the United States, and it concluded that the wetland on the Property had such a "significant nexus" and that the Property "is in fact not isolated, and is subject to the jurisdiction of the [Clean Water Act]. Appendix at 49a. But the district court did not identify what constituted the "significant nexus" in this case, nor did it address the significance, if any, of the undisputed fact that the wetland lacked any hydrological connection with any of the "waters of the United States."

C. The Sixth Circuit Opinion

On appeal, the Petitioners reiterated their argument that the Property was not subject to federal jurisdiction under the Clean Water Act because it did not have a significant nexus with a federal water. The Sixth Circuit rejected this argument by concluding that the physical adjacency of the Property to a tributary of a federal water was sufficient to create federal jurisdiction. Appendix at 12a. The Sixth Circuit began its analysis by noting that the Corps' interpretation of its own regulations was entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Appendix at 6a-7a. Applying 33 C.F.R. § 328.3(a)(7), the Sixth Circuit reasoned that the existence of the berm separating the Property from the drainage ditch did not prevent federal jurisdiction because, under that regulation, the definition of "adjacent wetlands" includes a wetland that is separated by a berm or man-made barriers from a tributary of federal waters. Appendix at 9a. The Sixth Circuit then noted that this reading of § 328.3(a)(7) was not affected by this Court's decision in

SWANCC. Appendix at 10a. According to the Sixth Circuit, most federal circuit courts, with the exception of the Fifth Circuit, have held that *SWANCC* should be narrowly applied, only precluding federal jurisdiction over isolated waters. *Id.* (citing cases). Thus, the Sixth Circuit concluded that this Court's decision in *SWANCC* did not alter the broad definition of "adjacent wetlands" that the Sixth Circuit found in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985). Appendix at 10a-12a. Under that definition, the Sixth Circuit held that the district court did not err in finding that the Property did not contain isolated wetlands and that it had a "significant nexus" with federal waters. Appendix at 12a. In reaching this holding, the Sixth Circuit, like the district court, did not, however, precisely explain what characteristic of the Property provided this "significant nexus." *See id.*

REASONS FOR GRANTING THE PETITION

I

THERE IS A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER FEDERAL AUTHORITY UNDER SECTION 404(a) OF THE ACT EXTENDS TO WETLANDS THAT LACK ANY HYDROLOGICAL CONNECTION TO A NAVIGABLE WATER OR A TRIBUTARY OF A NAVIGABLE WATER

The Sixth Circuit's decision in this case creates a new conflict among the circuit courts and deepens an existing conflict, both of which relate to the scope of federal authority over "adjacent wetlands" under § 404(a) of the Clean Water Act. As the Corps conceded here when it moved for the publication of the

Sixth Circuit's opinion, the decision here makes new law; it is the first decision by any circuit court concluding that the federal authority created by § 404(a) extends to a wetland despite the absence of any direct or indirect hydrological connection establishing the "significant nexus" between that wetland and any navigable water. The conflict created in this case overlays an existing conflict between the Fifth Circuit and other circuits, regarding whether this Court's decision in *SWANCC* requires that federal jurisdiction over wetlands is restricted to those wetlands that are adjacent to waters that are actually navigable. These conflicts require that this Court grant a writ of certiorari and clarify the scope of federal jurisdiction under § 404 with respect to adjacent wetlands.

Since this Court's opinion in *SWANCC*, the overwhelming majority of federal circuit and district courts have held that § 404(a) extends federal authority over wetlands when there is, at a minimum, a hydrological connection between those wetlands and federal waters. This jurisdictional principle is perfectly consistent with the fundamental purpose of the Act, as expressed in the Act itself and as recognized by this Court in *SWANCC*. *SWANCC*, 531 U.S. at 166 (citing 33 U.S.C. § 1251(a)). A wetland will have an effect on the "chemical, physical, and biological integrity" of the waters of the United States only when water from that wetland actually mingles with the waters of the United States through a hydrological connection. In the absence of such a connection, the wetland is isolated from federal waters and will not have any direct causal effect on the integrity of the waters of the United States. Consequently, the wetland on the Property is

not properly subject to the federal authority created by the Act.

The Fourth Circuit has repeatedly held that federal authority under the Act is limited to adjacent wetlands that have a hydrological connection to federal waters. In *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004), the Fourth Circuit considered whether there was a "significant nexus" between a wetland and navigable waters via a surface-water connection between the wetland and non-navigable tributaries of Chesapeake Bay. The Fourth Circuit answered this question in the affirmative, even though the hydrological connection was effected intermittently through man-made roadside ditches as well as through natural bodies of water. Despite its tenuous character, the hydrological connection itself was the foundation of the Fourth Circuit's conclusion that federal authority could lawfully be extended over the wetland. The Fourth Circuit reached an essentially identical conclusion on the basis of essentially identical reasoning in *Treacy v. Newdunn Assocs., L.L.P.*, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004).

In two opinions issued before the opinion at issue, even the Sixth Circuit indicated that finding a hydrological connection between wetlands and navigable waters is the crucial factor in determining whether those wetlands have the requisite "significant nexus" to warrant federal jurisdiction under § 404(a). *See United States v. Rapanos*, 376 F.3d 629 (2004)[1]; *United States v. Rapanos*, 339 F.3d 447 (2003), *cert.*

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[1] A petition for a writ of certiorari was filed in this case on January 28, 2005. It is docketed in this Court as Case No. 04-1034.

denied, 541 U.S. 972 (2004). These two cases, one civil and one criminal, arose from a property owner's decision to drain wetlands on his property, which was located at least eleven miles from the nearest navigable water but was connected to that water by the flow of surface water through several different non-navigable bodies of water. In the criminal case, which was decided first, the Sixth Circuit pointed out that "[t]he evidence presented in this case suffices to show that the wetlands on Rapanos's land are adjacent to the Labozinski Drain, especially in view of the hydrological connection between the two." *Rapanos*, 339 F.3d at 453. Similarly, in the civil case, which was decided slightly more than two weeks before this case was argued in the Sixth Circuit, the court rejected the property owner's argument that "direct abutment" was required to invoke CWA jurisdiction, holding that "[n]on-navigable waters must have a hydrological connection or some other 'significant nexus' to traditional navigable waters in order to invoke [Clean Water Act] jurisdiction." *Rapanos*, 376 F.3d at 642.

Other courts, ruling before and after *SWANCC*, have concluded that the Act extends to wetlands that have, at the very least, a hydrological connection to the "waters of the United States. *See, e.g., United States v. Buday*, 138 F. Supp. 2d 1282, 1291-92 (D. Mont. 2001); *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998); *United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983); *United States v. Lee Wood Contracting, Inc.*, 529 F. Supp. 119, 120-21 (E.D. Mich. 1981).

In addition to the cases that directly address the question of federal authority over wetlands, there are

other cases that are consistent with the proposition that federal authority under the Act extends to only to those waters that have a hydrological connection with one of the "waters of the United States." In *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001), the Ninth Circuit concluded that agricultural irrigation canals were not isolated because they exchanged water with tributaries of navigable waters. *Headwaters*, 243 F.3d at 533. In *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001), the district court conducted an essentially identical analysis, concluding that a non-navigable tributary was subject to federal authority under the Act by virtue of the fact that it had a hydrological connection with a navigable water, even though that connection involved the flow of surface water over a pasture.

The Sixth Circuit's opinion in this case marks a dramatic departure from the manner in which all of these federal courts have understood the meaning of "significant nexus." Instead of focusing its jurisdictional analysis whether there was a hydrological connection between the Property and any navigable water or tributary of a navigable water, the Sixth Circuit focused instead on the Property's physical proximity to the drainage ditch that was connected to non-navigable tributaries of Lake St. Clair. Appendix at 9a. Although the Sixth Circuit recognized that the identification of a "significant nexus" was essential to the definition of the scope of federal authority, the court presumed that such a nexus could be established simply by physical proximity. Appendix at 9a-12a. In so doing, the Sixth Circuit did not address the fact that so many other courts had concentrated on the centrality of a hydrological connection or on the fact

that, in the *Rapanos* cases, the Sixth Circuit itself defined the scope of federal authority in terms of the existence of a hydrological connection.

Only one other court has held that federal jurisdiction under § 404 may be found over an adjacent wetland despite the absence of a hydrological connection and solely on the basis of physical proximity. In *Baccarat Fremont Developers v. United States Army Corps of Eng'rs*, 327 F. Supp. 2d 1121 (N.D. Cal. 2003), the district court held that a wetland would still be considered adjacent to federal waters if it was separated from those waters by a man-made barrier. It concluded that *SWANCC* was not directly relevant to the construction of the concept of adjacency, and that there was no need to find the existence of a hydrological connection as a basis for concluding that a wetland was "adjacent" for the purposes of 33 C.F.R. § 328.3(a)(7). *Baccarat Fremont Developers*, 327 F. Supp. 2d at 1127-28; *see also Northern California River Watch v. City of Healdsburg*, 2004 WL 201502, *9 (N.D. Cal. Jan. 23, 2004) (asserting that "*SWANCC* did not impose a rule of 'hydrological connection' . . . .").

The conflict among federal circuit and district courts regarding the scope of federal authority over adjacent wetlands is related to a similar conflict between different circuits about the consequences of *SWANCC*. That conflict turns on the question whether federal authority over adjacent wetlands is limited to wetlands adjacent to bodies of navigable water. In both *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) and *In re Needham*, 354 F.3d 340 (5th Cir. 2003), the Fifth Circuit primarily addressed a question of the scope of federal authority under the Oil Pollution Act,

but, in so doing, it also made clear conclusions about the scope of federal authority under the CWA. The Fifth Circuit looked to *SWANCC* for general guidance about the scope of federal authority to regulate an oil spill into the non-navigable tributaries of navigable waters, and it concluded that the fundamental principles set forth in *SWANCC* limited federal authority generally to navigable waters or to bodies of non-navigable water that were immediately adjacent to navigable waters. *Rice*, 250 F.3d at 269; *Needham*, 354 F.3d at 345-46. In particular, the *Rice* court focused upon this Court's assertion in *SWANCC* that "'in order to rule for [the Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this.'" *Rice*, 250 F.3d at 269 (quoting *SWANCC*, 531 U.S. at 168)). As explained by the Sixth Circuit in this case, the Fifth Circuit's holding is directly contrary to holdings by the Fourth and Sixth Circuits, both of which have held that federal authority under the Act can be extended to wetlands that are adjacent to non-navigable tributaries of navigable waters. Appendix at 10a (citing *Deaton* and *Rapanos*, *supra*).

All of these divergent rulings by the federal district and circuit courts demonstrate that there is substantial confusion about how this Court's opinion in *SWANCC* has generally affected the analysis of the scope of federal authority under § 404(a) and, in particular, about what precisely constitutes the "significant nexus" that is required for the exercise of federal authority under the Act. By issuing a writ of certiorari in this case, and by ruling on the question whether a hydrological connection is essential to finding

a "significant nexus," this Court can resolve this confusion and clarify the meaning and proper application of *SWANCC*.

II

THE EXTENSION OF FEDERAL JURISDICTION UNDER § 404(a) TO ANY WETLAND THAT IS ONLY PHYSICALLY PROXIMATE TO A FEDERAL WATER IS INCONSISTENT WITH THIS COURT'S HOLDING IN *SWANCC* AND WITH THE LIMITS OF FEDERAL AUTHORITY UNDER THE ACT

This Court's decision in *SWANCC* established that the Act only provided federal authority for the purpose of restoring and maintaining "'the chemical, physical, and biological integrity of the Nation's waters'" and that the federal regulation of isolated, intrastate waters does not serve this purpose. When a wetland lacks a hydrological connection with any navigable water or tributary of a navigable water, it is isolated precisely as the man-made ponds in *SWANCC* were. Because the extension of federal authority to an isolated wetland will not advance the statutory purposes of the Act, such a wetland cannot be regulated by the Act.

This Court first addressed the general question of how wetlands fit into the bounds of regulatory authority under the Act in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). There, this Court began by noting the most fundamental purpose of the Act: maintaining and improving water quality. *Riverside Bayview*, 474 U.S. at 132. In light of this purpose, this Court acknowledged that, as the Corps had concluded in drafting its regulations, federal

authority under the Act must extend beyond navigable waters and include wetlands that are "integral parts of the aquatic environment." *Riverside Bayview*, 474 U.S. at 135. To decide what constituted an "integral part of the aquatic environment," the Court cited certain regulations promulgated under the Act, which identified three crucial functions for wetlands: (1) filtering and purifying water that drained into adjacent bodies of water; (2) slowing the flow of surface water runoff into lakes, rivers, and streams, as a means of preventing flooding and erosion; and (3) serving significant biological functions, including food chain production, habitat and nesting. *Riverside Bayview*, 474 U.S. at 134 (citing 33 C.F.R. § 320.4(b)(2)). Thus, this Court concluded that federal authority under the Act extended to any wetlands that were adjacent to navigable waters because such wetlands would serve these functions. *Riverside Bayview*, 474 U.S. at 135. But this conclusion was limited. This Court specifically pointed out that it was not ruling on the question whether federal authority under the Act extended to wetlands that were not adjacent to bodies of open water. *Riverside Bayview*, 474 U.S. at 131 n. 8.

Although *Riverside Bayview* identified fundamental principles that were necessary to determining whether and to what extent the Act covered wetlands adjacent to non-navigable waters, its holding was modified by this Court's decision in *SWANCC*, which clarified the scope of federal authority under the Act. In *SWANCC*, this Court considered the legality of one of the regulations promulgated by the Corps under the Act, the so-called "Migratory Bird Rule."

The Migratory Bird Rule defined "waters of the United States" to include any water that served or that might serve as a habitat for migratory birds or endangered species. *SWANCC*, 531 U.S. at 164 (discussing 51 Fed. Reg. 41217). The Corps defended this regulation as being properly within the scope of the Act's authority because the protection of such habitats was necessary for the preservation of the ecological integrity of aquatic ecosystems. *See id.* The Corps also contended that Congress had acquiesced in the Corps' interpretation of the scope of the Act's authority. *SWANCC*, 531 U.S. at 168-69. In this respect, the Corps' position was consistent with the assertion in *Riverside Bayview* that the Act purported to regulate waters for ecological purposes, particularly the protection of food chain production and biological habitats. *See Riverside Bayview*, 474 U.S. at 134-35.

This Court rejected the Corps' position that the Act permitted the regulation of intrastate waters solely for the purpose of protecting ecological connections between those intrastate waters and waters of the United States, and, therefore, it held that the Corps' promulgation of the Migratory Bird Rule exceeded the authority created by the Act. *SWANCC*, 531 U.S. at 171-72. The foundation of this Court's reasoning was that the animating purpose of the Act was to protect waters and aquatic ecosystems, including wetlands, that had a "significant nexus" with navigable waters. *SWANCC*, 531 U.S. at 167. Consequently, this Court held that wetlands were subject to regulation under the Act to the extent that they were "'inseparably bound up'" with the "waters of the United States." *Id.* (quoting *Riverside Bayview*, 474 U.S. at 134).

In so holding, this Court limited the holding of *Riverside Bayview* to the extent that *Riverside Bayview* held that federal jurisdiction could be based upon a purely ecological connection between a wetland and a navigable water. Indeed, in his dissenting opinion, Justice Stevens concluded that the majority's opinion in *SWANCC* had precisely this effect on the holding of *Riverside Bayview*. *See SWANCC*, 531 U.S. at 176 n. 2 (Stevens, J., dissenting). After *SWANCC*, this Court's opinion in *Riverside Bayview* can only be read to hold that wetlands are subject to regulation under the Act to the extent that they are "inseparably bound up" with the "waters of the United States."

The wetlands that meet this condition are those that, at a minimum, have a hydrological connection with the waters of the United States. A wetland that lacks such a hydrological connection, such as the one at issue in this case, has precisely the same relationship to the waters of the United States as the man-made ponds in *SWANCC*, which were found to be outside of the scope of the Act's authority. If there is pollution in a wetland that has a hydrological connection to those waters, the waters of the United States may be affected, and, therefore, the federal government has a legitimate interest in controlling such pollution. By contrast, however, there can be no legitimate federal interest in wetlands that lack any hydrological connection with waters of the United States because the condition of such wetlands is a purely intrastate matter. Indeed, the federal regulation of hydrologically isolated wetlands would disturb the states' power to be the primary source of authority over the use and development of land and water resources, which, as this Court recognized, the Act expressly recognized and

preserved. *SWANCC*, 531 U.S. at 174 (quoting 33 U.S.C. § 1251(b)).

As noted in the previous section, the overwhelming majority of federal courts have concluded that, in light of *SWANCC*, the federal authority to regulate wetlands under the Act extends only to wetlands that have a hydrological connection with the waters of the United States. In all of these cases, courts have focused on finding the existence of such a connection as a prerequisite for determining federal jurisdiction. *See, e.g., United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); *Treacy v. Newdunn Assocs., L.L.P.*, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); *United States v. Rapanos*, 376 F.3d 629 (2004); *United States v. Rapanos*, 339 F.3d 447 (2003), *cert. denied*, 541 U.S. 972 (2004); *United States v. Buday*, 138 F. Supp. 2d 1282, 1291-92 (D. Mont. 2001). Even in cases decided before *SWANCC*, the overwhelming majority of courts conducted the same analysis as a basis for determining the scope of federal authority over wetlands. *See, e.g., United States v. Banks*, 115 F.3d 916, 920-21 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998); *United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983); *United States v. Lee Wood Contracting, Inc.*, 529 F. Supp. 119, 121 (E.D. Mich. 1981).

The Fifth Circuit has gone further than these courts in its understanding of how this Court's opinion in *SWANCC* limited the scope of federal authority under the Act. It has held that *SWANCC* limited federal authority to wetlands that are adjacent to navigable waters. *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001); *In re Needham*, 354 F.3d

340 (5th Cir. 2003). The Fifth Circuit expressed the principle this way: "a body of water is subject to regulation under the [Clean Water Act] if the body of water is actually navigable or is adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. Even though this reading of *SWANCC* imposes a more restrictive interpretation of the Act, it is nevertheless consistent with the proposition that *SWANCC* eliminated an ecological connection as a basis for defining the limits of federal authority and required an immediate connection between wetlands and waters of the United States, such that pollution in the wetlands would have a direct effect on the quality of federal waters.

The Sixth Circuit's opinion in this case is contrary to all of this federal authority, and, most importantly, to this Court's opinion in *SWANCC* because it concluded that the Property was within the Corps' jurisdiction under the Act without finding that there was a hydrological connection between the Property and any other body of water, navigable or non-navigable. Indeed, the record in this case made it impossible for the Sixth Circuit to find the existence of a hydrological connection. There was no evidence of any hydrological connection between the Property and any tributary of Lake St. Clair, and, in making its own findings, even the Corps determined that the Property "'is not part of the [Sutherland-Oemig Drain] watershed.'" Appendix at 52a (quoting the Corps' evaluation of Petitioners' permit application). Nevertheless, the Sixth Circuit concluded that, because the Property was physically adjacent to a drainage ditch that was a tributary to a navigable water, the

Property met the regulatory definition of "adjacent wetland." *Id.*

Given the record upon which its decision rested, the Sixth Circuit's ruling can be interpreted in one or both of two ways, neither of which is consistent with this Court's decision in *SWANCC*. First, it may reflect the conclusion that an ecological (as opposed to a hydrological) connection between a wetland and a navigable water is a sufficient basis for federal authority under the Act. In its own fact-finding and decision-making at the administrative level, the Corps devoted substantial attention to the ecological importance of the wetland on the Property. For example, in its decision letter, the first reason that the Corps gave for denying Petitioners' permit application was that "[y]our parcel is primarily a forested wetland that provides valuable seasonal habitat for aquatic organisms and year round habitat for terrestrial organisms." Appendix at 73a. In addition, the Corps asserted that Petitioners' permit should be denied because "[t]he minimization of impacts to these wetlands is important for conservation and the overall ecology of the region." Appendix at 74a. It is not surprising that the Corps should have concentrated so intently on ecological considerations because its decision was made in October 2000, before this Court's decision in *SWANCC*. But such an emphasis on ecological factors as a foundation for federal authority is simply inconsistent with the reasoning that supported this Court's invalidation of the Migratory Bird Rule.

Second, the Sixth Circuit's decision may be interpreted to reflect the conclusion that physical proximity alone is sufficient to establish the "significant

nexus" required by *SWANCC*. The Sixth Circuit's decision was based upon its conclusion that it was required to defer to the Corps' interpretation and application of its own regulations in accordance with *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Appendix at 6a-7a. Given this deference, the Sixth Circuit apparently decided that it was only required to determine whether the Property fit within the regulatory definition of "adjacent wetland" and that it was not required to examine whether that regulatory term and the Corps' application of it were consistent with the authority conferred by the Act. This approach conflicts with this Court's decision in *SWANCC*, where this Court pointed out that *Chevron* deference is not warranted when there is a question about whether an agency has exceeded the scope of the statutory authority under which it operates. *SWANCC*, 531 U.S. at 172. Because, as demonstrated above, physical proximity is not enough, in itself, to satisfy *SWANCC*'s "significant nexus" requirement, the Sixth Circuit erred in basing its jurisdictional analysis solely on its finding that the Property was adjacent to a tributary of a navigable water.

By correcting the Sixth Circuit's errors and reversing its judgment, this Court can clarify the precise nature of what constitutes a "significant nexus" between wetlands and the waters of the United States. Given this Court's ruling in *SWANCC*, and given the overwhelming weight of federal authority since that ruling, this Court should conclude that a "significant nexus" between a wetland and the waters of the United States requires, at a minimum, a hydrological connection between them. This construction of the

"significant nexus" requirement is consistent with the Act's objectives of controlling pollution in the waters of the United States and of preserving the traditional federal-state balance regarding the regulation of land and water. Moreover, this construction will not only resolve the conflict among the circuit courts that was created by the Sixth Circuit's decision here; it will also resolve the conflict between the Fifth Circuit and the other circuit courts regarding whether federal authority under the Act extends only to wetlands adjacent to navigable waters.

III

THE EXTENSION OF FEDERAL JURISDICTION UNDER § 404(a) TO ANY WETLAND THAT IS ONLY PHYSICALLY PROXIMATE TO A FEDERAL WATER IS PROHIBITED BY THE LIMITS ON CONGRESSIONAL AUTHORITY ESTABLISHED BY THE COMMERCE CLAUSE

In addition to being inconsistent with the fundamental purposes of the Act, the Sixth Circuit's reading of § 404(a) and its attendant regulations is also inconsistent with the limitations on federal legislative power that are established by the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3. As this Court suggested in *SWANCC*, the extension of federal authority to isolated, intrastate waters upsets the traditional balance between the state and federal governments regarding the regulation of land and water. Consequently, regardless of what Congress may have purported with respect to the Act, the Act cannot be interpreted or applied to provide for the federal

regulation of wetlands that lack any substantial effect on interstate commerce.

Because Congress enacted the Clean Water Act pursuant to its Commerce Clause authority, the scope of jurisdiction under the Clean Water Act is limited to waters that have some substantial connection to interstate commerce. In other words, the Clean Water Act regulates aquatic ecosystems that have an effect on interstate waters. *See SWANCC*, 531 U.S. at 172. In *United States v. Lopez*, 514 U.S. 549 (1995) and its progeny, including *United States v. Morrison*, 529 U.S. 598 (2000), this Court reaffirmed conceptions of what constitutes a substantial connection to interstate commerce. Thus, the *Lopez* line of cases is crucially relevant to the determination of when and to what extent a wetland can ever be found to have a substantial effect on interstate commerce. *See* Michael J. Gerhardt, *Federal Environmental Regulation in a Post-Lopez World: Some Questions and Answers*, 30 ENVTL. L. REP. 10980 (2000).

As this Court reaffirmed in *Lopez*, the core principle that defines the scope of congressional authority under the Commerce Clause is that such authority only extends to matters having a "'substantial economic effect'" on interstate commerce. *Lopez*, 514 U.S. at 556-57 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)). Accordingly, this Court has repeatedly held that the Commerce Clause authorizes Congress to regulate "three broad categories of activity:" (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities; and (3)

the power to regulate those activities having a substantial relation to interstate commerce. *Lopez*, 514 U.S. at 558-559. In order to determine which activities fall within the last category, a court must further examine (a) whether the statute controls a commercial activity or some activity necessary to the regulation of commercial or economic activity; (b) whether the statute's language includes a jurisdictional requirement ensuring that the regulated activity affects interstate commerce; and (c) how far the rationale for upholding the statute extends. *Lopez*, 514 U.S. at 563-64. These standards purport to assure that the federal government's powers will not become co-extensive with the general regulatory powers of the states, and legislation must not be interpreted or applied to compromise these standards. *See SWANCC*, 531 U.S. at 172.

The Sixth Circuit's reading of the scope of federal authority under § 404(a) is inconsistent with these limitations on federal authority under the Commerce Clause. The regulation of wetlands, such as the wetlands on the Property, obviously does not involve a regulation of the channels or instrumentalities of interstate commerce. There is no suggestion that the wetland on the Property is used in any way as a medium of interstate commerce. Consequently, the regulation of wetlands can only be justified to the extent that such wetlands have a substantial effect on interstate commerce. But wetlands that lack any hydrological connection to the waters of the United States do not have a substantial connection to interstate commerce in terms of the three factors identified in *Lopez*. First, the drainage or filling of wetlands does not relate to an economic activity.

Under § 404(a), it is unlawful to drain or fill a wetland for any reason or in connection with any activity, economic or not. Second, there is nothing in § 404(a) or the regulations promulgated under it constituting a "jurisdictional element which would ensure, through case-by-case inquiry, that the [regulated activity] affects interstate commerce." Nothing in the Act itself or in its attendant regulations would give the Corps or any other federal agency a method for distinguishing between wetlands that would have an effect on interstate commerce and wetlands that would not. Finally, there is no rationale for permitting the extension of federal authority under the Act to wetlands without any hydrological connection to the waters of the United States. As noted above, such regulation will not protect the integrity of waters of the United States because the absence of a hydrological connection assures that any harmful effects to the wetland will not be communicated to the waters of the United States. In short, wetlands without a hydrological connection to the waters of the United States are isolated from federal waters and, therefore, are not properly the subject of federal regulation.

Allowing the Act to extend to hydrologically isolated wetlands would also intrude upon the states' primary power to regulate land and water use, which, and this Court has noted that the Act cannot be interpreted to permit such an intrusion. *SWANCC*, 531 U.S. at 172. Indeed, this case precisely demonstrates how a conflict between federal and state regulation can emerge. Before the Corps ever considered exercising its authority over the Property, the Michigan Department of Environmental Quality (MDEQ) had granted Petitioners' state-law application to develop

the Property. In making its decision, the MDEQ evaluated a variety of ecological factors, particularly whether and to what extent the filling of the wetland on the Property might affect the Lake St. Clair watershed. After this consideration, it was the judgment of state government that Petitioners' use of the Property would not adversely affect any of the state's interests. Given that the Property has no demonstrable connection to any interstate water or to anything else that would substantially affect a federal interest, it is inconsistent with the fundamental principles underlying the Commerce Clause for the federal government to regulate the Property, or any other wetland that lacks a hydrological connection to the waters of the United States.

CONCLUSION

In *SWANCC*, this Court held that the Corps could not regulate an isolated intrastate water under the Clean Water Act. In this case, Petitioners own a wetland that is isolated in precisely the same way as the man-made ponds at issue in *SWANCC*. Just as it was unlawful for the Corps to regulate such ponds, so should it be unlawful for the Corps to regulate Petitioners' wetland. According to their established case law, the overwhelming majority of federal courts would prohibit the regulation of a hydrologically isolated intrastate wetland, but the Sixth Circuit has departed from all of this authority and has ruled that the Corps may regulate Petitioners' property, even though there was never any finding at any stage of this case of whether or how the development of Petitioners' property would substantially affect any federal interest. This Court should take jurisdiction of this

case to resolve the conflict created by the Sixth Circuit's decision here and to generally clarify the law regarding the scope of federal authority to regulate wetlands under the Act.

For these reasons, this Court should grant Petitioners' petition for a writ of certiorari.

Respectfully Submitted,

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(Any footnotes trail end of each document)

No. 03-1700

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

June Carabell; Keith Carabell; Harvey Gordenker; Frances Gordenker,
Plaintiffs-Appellants,

v.

United States Army Corps of Engineers; United States Environmental Protection Agency,
Defendants-Appellees.

August 11, 2004, Argued
Decided and Filed: September 27, 2004, Filed*

COUNSEL: ARGUED: Paul R. Bernard, DICKINSON, WRIGHT, PLLC, Detroit, Michigan, for Appellants.

Todd S. Kim, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

ON BRIEF: Paul R. Bernard, Timothy A. Stoepker, DICKINSON, WRIGHT, PLLC, Detroit, Michigan, for Appellants.

Todd S. Kim, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

M. Reed Hopper, PACIFIC LEGAL FOUNDATION, Sacramento, California, for Amicus Curiae.

JUDGES: Before: BATCHELDER and GIBBONS, Circuit Judges; STAFFORD, District Judge**.

OPINION BY: STAFFORD

OPINION: STAFFORD, District Judge. Plaintiffs appeal the summary judgment for the defendants in this action to review final agency action under the Clean Water Act ("CWA"), 33 U.S.C. §§1251-1387. We affirm.

I.

Plaintiffs, June Carabell, Keith Carabell, Harvey Gordenker, and Frances Gordenker (collectively, "Carabells"), own 19.61 acres of property in Chesterfield Township, Macomb County, Michigan. In prehistoric times, this property was submerged under Lake St. Clair. As the lake receded over time, some areas of the Carabells' property remained covered by wetlands. Today, the property--located approximately one mile northwest of Lake St. Clair--encompasses 15.96 acres of wooded wetlands, constituting one of the last remaining large forested wetland parcels in Macomb County.

The Carabells want to construct a large multi-family condominium development on their property. The property is shaped like an inverted right triangle, the hypotenuse of which runs from the southwestern corner of the parcel at a 45 degree angle to the northeast corner. Following the hypotenuse and

separating the Carabells' property from the adjacent property is an unnamed ditch. When the ditch was excavated, the spoils were cast to either side of the ditch, creating upland berms approximately four feet wide along the banks of the ditch. The berm edging the Carabells' property serves to block immediate drainage of surface water out of the parcel into the ditch. Wooded conditions exist up to the upland rim of the ditch. At the northeastern corner of the property, the ditch connects to the Sutherland-Oemig Drain, which empties into the Auvase Creek, which empties into Lake St. Clair, which is part of the Great Lakes drainage system. Although the record does not establish the direction of water flow in the ditch, the ditch empties either into the Sutherland-Oemig Drain at the northeastern corner of the property, or into ditches at the southwestern corner of the property that--like the Sutherland-Oemig Drain--outlet into Auvase Creek and eventually into Lake St. Clair.

In 1993, the Carabells applied to the Michigan Department of Environmental Quality ("MDEQ") for a permit to fill 15.9 acres of the forested area of their property for construction of a 130-unit condominium complex. The MDEQ initially denied their application after the United States Environmental Protection Agency ("EPA") and the United States Fish and Wildlife Service filed comments opposing the application. The denial was based on findings that "the proposed activity would have a significant adverse impact on the natural resources, public interest and public trust held in the subject wetlands." J.A. at 667. On appeal, a state administrative law judge ("ALJ") ordered the MDEQ to issue the Carabells a state permit for a 112-unit alternative condominium

development with on-site wetland enhancement. Consistent with the ALJ's order, a permit was issued in November of 1998 over the EPA's objections. The permit specifically stated that "authority granted by this permit does not waive any jurisdiction of the U.S. Army Corps of Engineers or the need for a federal permit." J.A. at 49.

Soon after the permit was issued, the EPA notified the MDEQ that the state-issued permit did not constitute authority under the CWA for the permitted activities. The EPA asserted its federal jurisdiction over the Carrabells' project under the CWA, and it advised the MDEQ that the United States Army Corps of Engineers ("Corps") had the authority under the CWA to process a federal permit application by the Carrabells. Although the Carrabells contested federal jurisdiction over their project, they nonetheless applied to the Corps for a permit to place 57,437 cubic yards of fill on the wetland. The application indicated that they would disrupt 15.87 acres of wetland but would dredge and replant 3.74 acres of wetland.

On September 11, 2000, after three site inspections, the Corps issued its permit evaluation, stating that the operation and use of the proposed activity would have major, long term, negative impacts on water quality, on terrestrial wildlife, on the wetlands, on conservation, and on the overall ecology of the area. The Corps also stated that issuance of the permit would have minor negative impacts on downstream erosion and sedimentation, on flood hazards and floodplain values, and on aquatic wildlife. By letter dated October 5, 2000, the Corps notified the Carabells that their application

for a permit had been denied. In its letter, the Corps stated:

> Your parcel is primarily a forested wetland that provides valuable seasonal habitat for aquatic organisms and year round habitat for terrestrial organisms. Additionally, the site provides water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Auvase Creek, and Lake St. Clair. The minimization of impacts to these wetlands is important for conservation and the overall ecology of the region. Because the project development area is a forested wetland, the proposed project would destroy the resources in such a manner that they would not soon recover from impacts of the discharges. The extent of impacts in the project area when considered both individually and cumulatively would be unacceptable and contrary to the public interest. J.A. at 519. The Corps further explained that the denial was also based on the Carabells' failure to overcome the presumption that there were less damaging practicable alternatives available.

The Carabells filed an administrative appeal of the Corps' decision denying their permit application. The Carabells argued (1) that the Corps lacked regulatory jurisdiction over the property because the wetlands were purportedly isolated from all outside waters by a spoil berm; (2) that the MDEQ's permit issuance decision barred the Corps from denying the Carabells a permit; and (3) that the Corps should have issued the Carabells a permit because their proposed activities met all statutory and regulatory requirements. After a site visit by the appeal review officer and an appeal

conference, the Carabells were notified that all of their grounds for appeal lacked merit and that their appeal had been denied.

On July 26, 2001, the Carabells filed this action in federal district court. The case was referred to a magistrate judge, who held a hearing on the parties' cross-motions for summary judgment. The magistrate judge recommended that the Carabells' motion for summary judgment be denied and that the defendants' motion for summary judgment be granted. Among other things, the magistrate judge concluded that "because Plaintiffs' property is adjacent to neighboring tributaries of navigable waters and has a significant nexus to 'waters of the United States,' it is in fact not isolated, and is subject to the jurisdiction of the CWA." J.A. at 849. The magistrate judge also found that the denial of the Carabells' permit application was rational based on the Corps' conclusions regarding the likely effects of the Carabells' proposed project and on the Carabells' failure to demonstrate the absence of less damaging practicable alternatives. After the Carabells filed objections to the magistrate judge's report and recommendation, the district court entered an order and judgment accepting the magistrate judge's recommendations and entering the report and recommendations as the court's own findings and conclusions. This timely appeal ensued.

II.

We review the district court's summary judgment order de novo. Sierra Club v. Slater, 120 F.3d 623, 632 (6th Cir. 1997). Where, as here, the district court's order is based on its review of an administrative

agency's final decision, our review is governed by the Administrative Procedure Act ("APA"). Id. The APA provides that a court shall set aside an agency's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review is highly deferential, and the court is "not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971). An agency's factual findings are conclusive if supported by substantial evidence, and an agency's interpretation of its own regulations is entitled to substantial deference and will be upheld unless plainly erroneous or inconsistent with the regulatory text. 5 U.S.C. § 706 (2)(E); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945); United States v. Cinemark USA, Inc., 348 F.3d 569, 578 (6th Cir.2003).

III.

On appeal, the Carabells maintain that the district court erred when it (1) held that the Corps had CWA jurisdiction over the Carabells' property; and (2) affirmed the Corps' decision to deny the Carabells' permit application.

A.

The CWA requires landowners to obtain permits from the Corps before they discharge fill material into "navigable waters." 33 U.S.C. § 1344(a). Congress has defined "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. §

1362(7). The EPA and the Corps have defined "waters of the United States" to include:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce...

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.33 C.F.R. § 328.3(a) (Corps) (emphasis added); see also 40 C.F.R. § 122.2 (EPA). The Corps defines "adjacent" to mean "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c). "Adjacent wetlands" include "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." Id.

In this case, the district court determined that the Carabells' property contains wetlands adjacent to neighboring tributaries of navigable waters of the United States. Specifically, the magistrate judge, whose report was accepted by the district court, found that:

Plaintiffs' property in this case is not isolated. It is undisputed that the property is adjacent to an unnamed ditch, and that the ditch connects to the Sutherland-Oemig Drain. The Drain, which neighbors a corner of the property, connects to Lake St. Clair.J.A. at 847. Having concluded that the Carabells' property is not isolated from waters of the United States but instead constitutes "adjacent wetlands" within the meaning of the CWA, the district court decided that jurisdiction under the CWA existed. We agree with that decision.

The record here establishes that the unnamed ditch running along the hypotenuse of the Carabells' triangle-shaped property is separated from wetlands only by a man-made berm or barrier. At its northeastern end, the ditch is connected to the Sutherland-Oemig Drain, a drain that empties into the Auvase Creek, which, in turn, empties into Lake St. Clair, which connects to Lake Huron and Lake Erie. At its southwestern end, the ditch is connected to other ditches, which--like the Sutherland-Oemig Drain--outlet into the Auvase Creek and eventually into Lake St. Clair. The ditch, then, is connected on either end to tributaries of "waters of the United States" as defined in the regulations. Whether water in the ditch flows northeasterly or southwesterly, the ditch is necessarily a tributary of "waters identified in paragraphs (a)(1)-(6) of...section [328.3(a)]." Because the wetlands on the Carabells'

property are separated from a tributary of "waters of the United States" only by a man-made berm or barrier, they are considered "adjacent wetlands" under § 328.3(a)(7). As such, the wetlands at issue in this case fall within the jurisdiction of the Corps for purposes of the CWA.

The Supreme Court's decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001) ("SWANCC"), does not persuade us otherwise. Before SWANCC, the Corps had defined its jurisdiction under the CWA as extending to intrastate waters that provide habitat for migratory birds. In rejecting the Corps' "Migratory Bird Rule," the SWANCC Court made clear that isolated intrastate waters cannot be subject to the Corps' jurisdiction under the CWA. Id. at 166.

A minority of courts have read SWANCC broadly to limit the Corps' jurisdiction under the CWA to navigable waters and non-navigable waters that directly abut navigable waters. See, e.g., In re Needham, 354 F.3d 340, 345-46 (5th Cir. 2003). Conversely, a majority of courts, including this court, have narrowly interpreted SWANCC as holding only that the CWA does not reach isolated waters--in SWANCC, an abandoned, isolated gravel pit--having no connection with navigable waters. See, e.g., United States v. Rapanos, 339 F.3d 447, 452-53 (6th Cir. 2003) (adopting a limited reading of SWANCC and concluding that the CWA reached a roadside ditch and its adjacent wetlands), cert. denied, 158 L. Ed. 2d 467, 124 S. Ct. 1875 (2004); United States v. Deaton, 332 F.3d 698, 702 (4th Cir. 2003) (same).

In United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985), the Supreme Court upheld the Corps' "adjacent wetlands" jurisdiction. Noting that Congress chose to define the waters covered by the CWA broadly, the Court wrote:

> Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment--or where its importance is outweighed by other values--the Corps may always allow development of the wetland for other uses simply by issuing a permit.

Id. at 135 n.9. In SWANCC, moreover, the Court did not alter the Riverside-Bayview holding. Indeed, while noting Congress's "unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters," SWANCC, 531 U.S. at 167, the SWANCC Court did not decide any issue with regard to "adjacent wetlands" under 33 C.F.R. § 328.3(a)(7). The SWANCC Court instead addressed the application of the Corps' Migratory Bird Rule to isolated ponds defined as

"waters of the United States" under § 328.3(a)(3). 531 U.S. at 174.

Since SWANCC, this court has noted:

> In Riverside Bayview the Supreme Court concluded that the Corps regulation extending jurisdiction to adjacent wetlands was a reasonable interpretation in part because of what [Solid Waste] described as "the significant nexus between the wetlands and 'navigable waters.' "There is also a nexus between a navigable waterway and its nonnavigable tributaries....This nexus, in light of the "breadth of congressional concern for protection of water quality and aquatic ecosystems," is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted. The regulation, as the Corps reads it, reflects a reasonable interpretation of the Clean Water Act.

Rapanos, 339 F.3d at 452 (quoting Deaton, 332 F.3d at 712); see also United States v. Rapanos, 376 F.3d 629, 639 (6th Cir. 2004) (explaining that CWA jurisdiction over "adjacent wetlands" requires a significant nexus between the wetlands and navigable waters, "which can be satisfied by the presence of a hydrological connection"). Consistent with both Rapanos cases, the district court in this case determined that there is a "significant nexus" between the wetlands on the Carabells' property and the adjacent nonnavigable ditch abutting their property, a ditch that flows one way or another into other tributaries of navigable waters of the United States. We find no error in the district court's decision.

B.

The Carabells contend that, even if CWA jurisdiction exists over their property, the district court nonetheless erred by failing to overrule the Corps' decision on the merits of their permit application. Based on its review of the relevant regulations and the Corps' evaluation of the Carabells' permit application, the district court concluded that the Corps provided a rational basis for its decision. Because we agree that the Corps' decision was neither arbitrary nor capricious, we find no basis for disturbing the district court's determination.

IV.

For the foregoing reasons, we AFFIRM the district court's decision granting summary judgment to the defendants.

Footnotes

* This decision was originally issued as an "unpublished decision" filed on September 27, 2004. On November 15, 2004, the court designated the opinion as one recommended for full-text publication.

** The Honorable William Stafford, United States District Judge for the Northern District of Florida, sitting by designation.

No. 03-1700

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

June Carabell; Keith Carabell; Harvey Gordenker; Frances Gordenker,
Plaintiffs-Appellants,

v.

United States Army Corps of Engineers; United States Environmental Protection Agency,
Defendants-Appellees.

Filed: September 27, 2004, Filed

Before: BATCHELDER and GIBBONS, Circuit Judges; STAFFORD, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting summary judgment to the defendants is AFFIRMED.

ENTERED BY THE COURT

Leonard Green, Clerk

CASE NO. 01-72797

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JUNE CARABELL, and individual, KEITH CARABELL, an individual, HARVEY GORDENKER, an individual, and FRANCES GORDENKER, an individual,
Plaintiffs,

- vs -

THE UNITED STATES ARMY CORPS OF ENGINEERS and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendants.

March 27, 2003, Decided
March 27, 2003, Filed

ORDER (1) ACCEPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, (2) GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND (3) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COUNSEL: For JUNE CARABELL, KEITH CARABELL, HARVEY GORDENKER, FRANCES GORDENKER, plaintiffs: Timothy A. Stoepker, Peter H. Webster, Paul R. Bernard, Jennifer P. Fitzgibbons, Dickinson Wright, Detroit, MI.

For UNITED STATES ARMY CORPS OF ENGINEERS, ENVIRONMENTAL PROTECTION AGENCY, defendants: Geneva S. Halliday, Eastern District of Michigan, U.S. Attorney's Office, Detroit, MI. Laurel A. Bedig, U.S. Department of Justice, Environmental Defense Section, Washington, DC.

JUDGES: PAUL D. BORMAN, UNITED STATES DISTRICT JUDGE.

OPINION BY: PAUL D. BORMAN

OPINION:

The Court has reviewed the magistrate judge's Report and Recommendation, filed on February 28, 2003. The Court has also reviewed the Plaintiffs' Objections to the Report and Recommendation, which was filed on March 14, 2003.

IT IS ORDERED that the Report and Recommendation (Docket # 22) is accepted and entered as the findings and conclusions of this Court, that Plaintiffs' motion for summary judgment is DENIED, and that Defendants' motion for summary judgment

is GRANTED.

PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

DATED: MAR 27 2003
Detroit, Michigan

JUDGMENT

On this date, the Court accepted the Report and Recommendation of Magistrate Judge Wallace Capel.

Therefore a judgment shall be entered in favor of the Defendants, The United States Army Corps of Engineers and the United States Environmental Protection Agency and against the Plaintiffs, June Carabell, Keith Carabell, Harvey Gordenker, and Francis Gordenker.

DATED: 3/27/03

No. 03-1700

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUNE CARABELL, ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,
Defendants-Appellees.

Filed: January 10, 2005

ORDER

BEFORE: BATCHELDER and GIBBONS, Circuit Court Judges; and STAFFORD*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY THE COURT

Leonard Green, Clerk

Footnotes

* Hon. William H. Stafford, Senior, United States District Judge for the Northern District of Florida, sitting by designation.

Case No.: 01-CV-72797-DT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JUNE CARABELL, et. al.,
Plaintiffs,

vs.

THE UNITED STATES ARMY CORPS OF ENGINEERS and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendants.

February 28, 2003, Decided
February 28, 2003, Filed

REPORT AND RECOMMENDATION

COUNSEL: For JUNE CARABELL, KEITH CARABELL, HARVEY GORDENKER, FRANCES GORDENKER, plaintiffs: Timothy A. Stoepker, Peter H. Webster, Paul R. Bernard, Jennifer P. Fitzgibbons, Dickinson Wright, Detroit, MI.

For UNITED STATES ARMY CORPS OF ENGINEERS, ENVIRONMENTAL PROTECTION AGENCY, defendants: Geneva S. Halliday, Eastern District of Michigan, Detroit, MI.

For UNITED STATES ARMY CORPS OF ENGINEERS, ENVIRONMENTAL PROTECTION AGENCY, defendants: Laurel A. Bedig, U.S. Department of Justice, Washington, DC.

JUDGES: WALLACE CAPEL, JR., UNITED STATES MAGISTRATE JUDGE. HON. PAUL D. BORMAN.

OPINION BY: WALLACE CAPEL , JR.

OPINION:

I. INTRODUCTION

This matter is before the Court on the parties' cross-Motions for Summary Judgment filed on April 12, 2002, and May 31, 2002. Both Motions concern the denial of a 404 Permit by the Army Corps of Engineers ("COE"), to fill wetland on Plaintiffs' property. At issue is whether the COE has jurisdiction over Plaintiffs' property, and if so, whether the decision to deny the Permit was arbitrary and capricious.

II. PLAINTIFFS' STATEMENT OF FACTS

A. The Carabell Property

Keith and June Carabell own a 19.6-acre parcel of land located in Chesterfield Township, Macomb County, Michigan. The property is shaped roughly like an inverted right angle, with one leg running along a north-south line, and the other leg running along an east-west line. (See Site Location Maps, attached to Carabell's Application for Permit to Army Corps and MDEQ, DNR File No. 93-14-0602). The hypotenuse of the triangle runs along a northeast-southwest line, and a ditch for a county drain, the Sutherland-Oemig Drain, follows the hypotenuse for 1,800 feet. (Id). The ditch is no wider than four feet, and the water in it is no deeper than six inches.

An upland ridge runs along the west side of the drain; it was apparently formed by the sidecasting of spoils during the excavation of the ditch. (MDEQ Proposal for Decision, 8/12/99, at 11). This clay ridge prevents water from the forested area of the property from draining into the ditch. Another small amount of upland, less than four acres, is located in the southwest corner of the parcel. (See Site Location Maps, supra). The property is forested predominantly with swamp oak and cottonwood trees, and includes no man-made structures. (Leighton Testimony, 10/27/97 at 357).

The property retains an undetermined amount of water for an undetermined period, and it has not been established in the record whether the property retains this water on an annual basis or less frequently. (See Administrative Appeal Decision, 3/5/2001 at 3). The record evidence is uncontroverted on one point: the property does not retain water at all times. (MDEQ Proposal for Decision, 8/12/99 at 11). Moreover, it is also undisputed that the property does not have a surface water connection to any adjacent property or any adjacent body of water. (Id). In short, the water that is periodically present in the forested portion of the property does not drain to the Sutherland-Oemig drain or to any body of water; it remains on the property until it is absorbed by the soil and vegetation.

The property abuts Donner Road, which runs along its north-south side, and it is near Interstate 94, which passes to its northwest. (See Site Location Maps, supra). A large subdivision of single-family homes is between the property and the freeway. (Id). To the north of the property is 23 Mile Road, and, between that road and the property are a vacant field and

several condominium and apartment complexes. (Id). To the southeast of the property, on the other side of the Sutherland-Oemig Drain, is another subdivision of residential homes, and this subdivision borders Lake St. Clair. (Id). To the east of the property is a vacant woodlot, several more residential subdivisions and then a large woodlot, which is slated for development into a residential subdivision. (Id).

B. Proceedings Before the MDEQ and Issuance of a Permit to Plaintiffs.

In 1993, the Carabells applied to the MDEQ for a permit to fill 15.9 acres of the forested area of the property for the purpose of building 130 condominium units, along with the associated roads and utilities. In March 1994, the EPA filed written objections to the Carabell's application. The MDEQ then denied the application.

The Carabell's then filed an alternative plan, seeking to fill only 12.2 acres and build 112 condominium units. (MDEQ Application, supra). The alternative plan also proposed to construct retention ponds on 3.74 acres of the property; these ponds would filter any water draining across the property as a result of the development. n1 (See MDEQ Proposed Decision, 8/12/99).

The MDEQ then conducted a contested case hearing before an administrative law judge. The Carabells and the MDEQ submitted extensive testimonial and documentary evidence to the ALJ, who issued a proposed decision in August 1998 that recommended the issuance of the permit. Crucial to the ALJ's ruling

was the fact that the property was isolated from any body of water:

This opinion is premised on the fact the wetland does not have a surface water connection to adjacent properties or any body of water, and the property to the immediate north is isolated by a retention pond. Furthermore, the drainage ditch along Donner Road prevents a discharge of water both to and from the site, and the Sutherland-Oemig drain is bermed, which prevents the discharge of water either into it or from the drain.

(Id. at 11)(emphasis added).

A final Determination and Order embodying the proposed decision was issued on September 30, 1998. (MDEQ Final Determination and Order, 9/30/99). This order mandated that the Carabells be granted a permit allowing them to develop the property according to their alternative plan.

C. Intervention by the EPA and Corps.

In November 1998, acting pursuant to 33 U.S.C. § 1344, the EPA notified the MDEQ that it objected to the issuance of the permit to Plaintiffs, and it asserted federal jurisdiction over the case on the ground that the property was a wetland that was adjacent to the navigable waters of the United States. Also pursuant to § 1344, the EPA authorized the Corps to determine whether a federal permit should issue to allow the proposed development. Although the Carabells contested federal jurisdiction, they nevertheless submitted a permit application to the Corps.

The Corps initially conducted a Permit Evaluation, which was based upon three site inspections. (Department of Army Permit Evaluation, 9/11/2000). In the Permit Evaluation, the Corps found that the property must be part of the Lake St. Clair watershed because other property in a roughly similar location was a part of the watershed. In the words of the Permit Evaluation: "due to the fact that the influence of Lake St. Clair has been documented on the nearby Salt River over a mile up the reaches of the river (to 23 Mile Road), it is likely that the same influence is realized on the Auvase Creek, and continuing up the Sutherland-Oemig Drain that distance in the landscape, as well." (Id. at 6)(emphasis added). The Permit Evaluation also noted that the drainage ditch along the hypotenuse of the property drained into the Sutherland-Oemig Drain, but, in making this finding, the Corps did not cite any particular observation or other evidence. (Id). The finding seems to be based upon its assessment of the probability that the property was part of the Lake St. Clair watershed.

Indeed, the speculative character of the Corps's entire fact-finding is confirmed by its description of the relationship of the property to the tributary system of Lake St. Clair. According to the Corps, the "ditch ... along the southeast portion of the property" runs into the Sutherland-Oemig Drain, which runs into Auvase Creek, which runs into Lake St. Clair. (Id). This is simply a factual error. The "ditch ... along the southeast portion of the property" is the Sutherland-Oemig Drain. This error demonstrates the haphazardness of the Corps's own factual inquiry.

The Corps denied that application on October 5, 2000. (Letter from Lt. Col. Richard J. Polo, 10/5/2000 ("Decision Letter")). In this Decision Letter to the Carabells, the Corps's District Engineer, Lt. Col. Richard J. Polo, Jr., noted that the property was a valuable seasonal habitat for aquatic organisms and a year-round habitat for terrestrial organisms and that the property "provides water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Auvase Creek, and Lake St. Clair." (Id. at 1) In an accompanying Memorandum for the Record, Lt. Colo. Polo found that projects like the one proposed by the Carabells were "resulting in increases in flood duration and frequency and a contribution to the degradation of water quality in the Lake St. Clair watershed." (Memorandum for the Record at 1). This impact on the water quality of the Lake St. Clair watershed was a crucial factor in Lt. Col. Polo's assessment of the public interests associated with the project. (Id. at 2).

In light of these characteristics of the property and in light of the Corps's assessment of the relative public and private interests, the decision letter concluded that it was necessary for the Carabells to identify feasible alternatives, such as the use of different parcels of upland property for the development or the changed use of the property to make the maximum possible use of the upland along Donner Road. (Decision Letter at 2). Whether or not such alternatives were feasible, Lt. Col. Polo concluded that the Carabells would have to mitigate any development of the property by providing "the complete functional replacement of the forested wetlands" on the property. (Decision Letter at 2).

On December 1, 2000, the Carabells submitted a request for an appeal to the Corps. (Request for Appeal). They argued that the Corps did not have jurisdiction over the property, that the MDEQ's decision to grant a permit precluded any action by any federal agency, and that the Corps erred in the merits of its decision. A Corps hearing officer conducted a brief visit to the property on January 30, 2001, and, later that day, conducted a hearing on the Carabells' appeal.

At the hearing, the Corps asserted that its jurisdiction was derived from § 1344 and 33 C.F.R. § 328.3(a) because the property was a wetland that was adjacent to the waters of the United States. (Transcript of 1/30/2001 at 18-19). The Corps disclaimed jurisdiction under any other statue, including the migratory bird act. (Id.). In discussing the factual basis for federal jurisdiction, the Corps evaded an inquiry into whether the property was part of the Lake St. Clair watershed:

MR. STOEPKER: The question I have is can you cite to me where it says natural tributary system in the rules or statutes? I'm aware it says navigable. We were there today and there is nothing navigable here. A sailboat could not move up and navigate this. Does the drain flow north or south based upon the changes? Does it, in fact, flow into Lake St. Clair?

MS. CHUBB: [the Corps' Administrative Appeal Officer]: I think that is a separate question that will probably be answered in the appeal decision.

MR. STOEPKER: I guess my question to you, Mr. Guathier, where does it say tributary?

MS. CHUBB: Tributary to the navigable water, is that what you're asking?

MR. STOEPKER: Right.

MS. CHUBB: That is really a question for the division. It is not a question for the district. It may end up that way, but initially this is a division process.

(Id. At 20-21). Following in their pattern of avoidance, both the administrative hearing officer and the Army Corps evaded questions regarding the substantial effect of the Sutherland-Oemig Drain of the Carabell wetlands on interstate commerce, as neither would answer the questions posed by the Carabell's counsel:

MR. STOEPKER: Okay. I'm looking at a section of the regulations where it talks about interstate wetlands. All other water such as interstate lakes, rivers, streams, including intermittent streams, wetlands mud flats, sand flats, then which could effect interstate or foreign commerce, including such waters which are or could be used by interstate or foreign travelers for interstate or other purposes from which fishing or shellfish could or would be taken from interstate commerce.

Does anybody find any shellfish with in the Oemig Drain? Are any fish at all in the interstate commerce, is that the position you're taking? The next qualification - I mean is that answer yes or no? I need to know.

MS. CHUBB: This is not an inquisition here. It is more of your presentation. Their record stands alone as it currently is. Whatever is in here is their position. That is the best they can do at this time.

(Id. at 21). These passages demonstrate that the Corps had no meaningful evidence to establish the directional flow of the Sutherland-Oemig Drain, its navigability, or its effect on interstate commerce.

The Corps denied the Carabells' appeal on March 5, 2001. In the Administrative Appeal Decision, the Corps continued to avoid making a conclusive finding regarding the connection between the property and the Lake St. Clair watershed. The Decision acknowledged that there was evidence directly contradicting the Permit Evaluation's findings regarding the flow of the Sutherland-Oemig Drain. Indeed, the Decision acknowledged that the Corps itself had not made a conclusive finding:

One confusing aspect of the ditch is the direction of water flow. The appellant's wetland consultant believed it flowed in a southwesternly direction away from the Sutherland-Oemig Drain while the District project manager (PM) observed it flowing northeasterly during a site visit. The PM remarked during the appeal site visit that he thought the drainage was more "feathery" (diffuse, less defined) to the southwest. A review of the spot elevations on Sheet 1 of the appellant's grading plan, dated 12 August 1999, does not clarify the issue.

(Administrative Appeal Decision at 3). Moreover, the Decision rejected the idea that facts about the influence of Lake St. Clair on the Salt River could have any bearing on the question whether the property was part of the Lake St. Clair watershed:

This District suggests that Section 10 jurisdiction from Lake St. Clair may extend upstream on its tributaries

(Auvase Creek and the Sutherland-Oemig Drain) to 23-Mile Road as it does on the Salt River, an established federally navigable water. The administrative record does not support this statement.

(Id).(emphasis added). Notwithstanding all of this uncertainty, the Decision concluded that the property was part of the watershed and was within federal jurisdiction because "the appellant has not presented any information to refute the District's evaluation." (Id. at 2-3).

The Decision also cursorily rejected the Carabells' arguments regarding the preclusion of federal agency action and the merits of the Corps' decision. In particular, the Decision's ruling regarding the merits of the permit application was derivative of its jurisdictional ruling. Because the property was identified as part of the Lake St. Clair watershed, the Decision regarded Lt. Col. Polo's evaluation of the merits of the application as correct. n2

III. DEFENDANT'S STATEMENT OF FACTS

A. Description of the Property

The property at issue contains one of the last remaining large forested wetlands in the whole of Macomb County. AR Vol. 1, Doc. 55. at 13; Doc. 75. The Corps determined in the permitting process that building in these wetlands would have a major, long term detrimental impact on water quality, terrestrial biota, wetlands, conversation and overall ecology, and would permanently destroy the forested wetlands on the

property. AR Vol. 1, Doc. 55, at 10, 14, 15, 16 and 21. See also Docs. 75, 76 and 89.

The property is located approximately one mile from the shoreline of Lake St. Clair and consists of approximately 19.6 acres, of which 15.96 acres were delineated as wetland by the Carabells in their permit application. See AR Vol. 1, Doc. 2 and Doc. 55, at 6. The Corps' inspection of the property confirmed that the property contains mostly forested wetlands. AR Vol. 1, Doc. 55, at 6; Doc. 70, at 1-2. These wetlands are the prehistoric remnant of Lake St. Clair. AR Vol. 1, Doc. 55, at 5. The property is triangular shaped and a ditch has been excavated along the southeast portion of the property (the hypotenuse of the triangle). AR Vol. 1, Doc. 55, at 6. This unnamed ditch runs into the Sutherland-Oemig Drain ("Drain") at the northeastern corner of the property. n3 The Drain empties into Auvase Creek which flows into Lake St. Clair. Id.; AR Vol. 1, Doc. 71. These drainage patterns were derived by the Corps based in part on the Corps' analysis of the United States Geological Survey's topographical quadrangle for New Haven, Michigan, which showed elevation contour lines descending down the Drain past the subject property to the point where the Drain and Harms Drain combine to form Auvase Creek, which is a connecting water with Lake St. Clair. See USGS Quadrangle Map for New Haven, Michigan cited at AR Vol. 1, Doc. 55, at 27.

The property contains a berm that runs along both sides of the ditch. The man-made berm was created from sidecast spoil as a result of the construction of the ditch. Id. at 7. The ditch appears to have been dug in wetland. AR Vol. 1, Doc. 89, at 2-3.

B. The Corps' Determination of Regulatory Jurisdiction

The Corps' Statement of Findings concerning the Carabell application based regulatory jurisdiction over the subject wetlands on the fact that the wetlands are "adjacent to a drain which empties directly into [Lake St Clair], a Section 10 water." n4 AR Vol. 1, Doc. 75, at 1. The District Project Manager documented the adjacency of the wetlands to the Drain during his site inspection on May 5, 2000. AR Vol. 1, Doc. 71.

Moreover, in the course of the appeal of the permit denial to the Corps' Great Lakes and Ohio River Division ("Division"), the Division found that the Carabell wetlands are also adjacent to the unnamed ditch. AR Vol. 1, Doc. 89, at 2-3. Thus, the wetlands are adjacent to both the Drain and the unnamed ditch. n5

C. The Carabells' Application to the Corps for a Permit

On August 23, 1999, the Corps received a permit application from the Carabells. n6 AR Vol. 1, Doc. 2. The Carabells proposed to discharge approximately 57,500 cubic yards of material within a 15.97 acre wetland area for construction of a 112-unit townhouse condominium development. AR Vol. 1, Doc 55, atl. As mitigation, the Carabells proposed to dredge and replant 3.74 acres of the remaining wetlands on the parcel. Id.

The Corps conducted three site inspections on the property. The first inspection occurred on October 12, 1999, for permit evaluation purposes; the second on May 5, 2000, for migratory bird use documentation; and the third on August 1, 2000, to determine if the area

contained Indiana Bat habitat. Id. at 6; AR Vol. 1, Docs. 70, 71, 72. The report summarizing the findings of the May 5, 2000 inspection included a determination of adjacency to the Sutherland-Oemig Drain and stated that the Drain flowed continuously into Auvase Creek which flows into Lake St. Clair. AR Vol. 1, Doc. 71; see also AR Vol. 1, Doc. 76, at 6.

On February 8, 2000, the Corps issued a Joint Public Notice for the proposed development. AR Vol. 1, Doc. 56. EPA, USFWS, the Macomb County Prosecutor's Office and the Lake St. Clair Advisory Committee all strongly objected to the proposed development. AR Vol. 1, Docs. 16, 17, 19, and 11, respectively. The USFWS specifically noted that wetlands of the type at issue here "are becoming increasingly scarce" (AR Vol. 1, Doc. 17) as did the Macomb County Prosecutor's Office ("this parcel is one of the last remaining sizeable areas of forested wetland in Chesterfield Township.") AR Vol. 1, Doc. 19.

The Corps prepared a 27-page Permit Evaluation dated September 11, 2000, which consisted of the Corps' Environmental Assessment, Public Interest review summary, and factual and compliance determinations according to the 404(b)(1) guidelines. AR Vol. 1, Doc. 55. On October 5, 2000, the Corps sent the Carabells a letter denying the permit and enclosing the Corps' Statement of Findings as well as a copy of the September 11, 2000 Permit Evaluation. AR Vol. 1, Doc. 76. The denial letter stated in part:

Your parcel is primarily a forested wetland that provides valuable seasonal habitat for aquatic organisms and year around habitat for terrestrial

organisms. Additionally, the site provides water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Auvase Creek, and Lake St. Clair. The minimization of impacts to these wetlands is important for conservation and the overall ecology of the region. Because the project development area is a forested wetland, the proposed project would destroy the resources in such a manner that they would not soon recover from impacts of the discharges. The extent of impacts in the project area when considered both individually and cumulatively would be unacceptable and contrary to the public interest.

AR Vol. 1, Doc. 76, at 1.

In addition to its determination that the proposed project was contrary to the public interest, the Corps' decision to deny the permit was also based upon the presumption in the 404(b)(1) guidelines that there are less damaging practicable alternatives available. Id. at 1-2. The Carabells did not overcome that presumption and, therefore, the project did not comply with the guidelines. Id.

D. The Carabells' Administrative Appeal of the Permit Denial

In a letter dated December 1, 2000, the Carabells appealed the Corps' denial of their permit application to the Division. The Carabells alleged that: (1) the Corps did not have regulatory jurisdiction over the wetlands; (2) the Corps was barred by res judicata (based on the prior holding in the State administrative appeal of the

permit denial by MDEQ and MDEQ's subsequent issuance of a permit) from denying the permit; and (3) the Carabells had demonstrated that the permit was issuable under the applicable laws and regulations. AR Vol. 1, Doc. 80.

On the jurisdictional issue, the Carabells argued that the wetlands are isolated and, therefore, based on the decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC"), 531 U.S. 159, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001), the Corps lacks regulatory jurisdiction. n7 AR Vol. 1, Doc. 89, at 2.

As part of the appeal process, the Division conducted an additional site inspection on January 30, 2001, which was documented by the Detroit District project manager. AR Vol. 1, Doc. 86. The participants in the site visit discussed the direction of the flow of the unnamed ditch. Mr. Leighton, the Carabells' consultant, believed that the ditch flowed southwest (away from the Sutherland-Oemig Drain). Mr. Deroche, the District project manager, stated that, in a previous site inspection, he had observed the ditch flowing northeast towards the Drain. AR Vol. 1, Docs. 87, 89.

On January 30, 2001, after the site visit, an appeal conference with the parties was held. The conference was transcribed (see AR Vol. 2, Doc. 9) and summarized in writing by the Appeal Review Officer. AR Vol. 2, Doc. 10.

On March 5, 2001, the Division issued its decision and found that the three issues for appeal presented by the Carabells lacked merit. AR Vol. 1, Doc. 89, at 5. First,

the Division found that SWANCC was not relevant because the wetlands were not isolated. Id. at 3. Rather, the Division found that the wetlands are adjacent "to a surface tributary system of a navigable waterway, Lake St. Clair." Id. at 1. In particular, the Division found that:

> The project manager observed that the onsite county ditch flowed into the Sutherland-Oemig Drain, which flows into Auvase Creek, which outlets into Lake St. Clair. The ditch appears to have been excavated in wetland based upon the adjoining onsite wetlands and the identification of poorly drained hydric soils ... The appellant's wetland consultant delineated the ditch as wetland. Spoil material from the excavated ditch was sidecast into berms on both sides of the ditch. However, the man-made spoil berm that separates the wetland from the ditch does not exclude adjacency as described above.
>
> Id. at 2-3.

The Division further found that the Carabells had not presented any information to refute this finding. Id. at 3.

Second, the Division also determined that res judicata was not a legal principle applicable to the appeal and did not bar the Corps from deciding against the Carabells. Id. at 4.

Finally, the Division determined that the District completed a fair and reasonable review of the Carabells' application in accordance with all applicable laws and regulations. Id. at 2. Specifically, the Division

found that the Carabells had not met their burden under the 404(b)(1) guidelines because they had not demonstrated that their proposal was the least environmentally damaging practicable alternative, and had not adequately demonstrated avoidance and minimization of aquatic impacts. Id. at 4, 5.

This appeal followed.

IV. STANDARD OF REVIEW

Judicial review of the decision of the COE is governed by the Administrative Procedure Act ("APA"). The APA provides that a court shall set aside agency "findings, conclusions, and actions" that are "arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The party asserting the challenge to the agency's actions bears the burden of demonstrating that these actions were arbitrary, capricious, or otherwise not in accordance with the law. See Sierra Club v. Marita, 46 F.3d 606, 616 (7th Cir. 1995). The standard of review is highly deferential and the final agency action is "entitled to a presumption of regularity." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415, 91 S. Ct. 814, 823, 28 L. Ed. 2d 136 (1971). The scope of judicial review "is narrow and the court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n. of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). The reviewing court must carefully "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." Citizens to Preserve Overton Park, 401 U.S. at 416. The reviewing

courts duty is to hold the agency to "certain minimal standards of rationality" and is not to inject its opinion in place of that of the agency who, because of its expertise has been entrusted with the decision making power. Ethyl Corp. v. EPA, 176 U.S. App. D.C. 373, 541 F.2d 1, 36 (D.C. Cir.) cert. denied, 426 U.S. 941, 96 S. Ct. 2662, 49 L. Ed. 2d 394, 96 S. Ct. 2663 (1976).

The court is not to serve as a "rubber stamp" to the agency's decision. Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n., 59 F.3d 284, 290 (1st Cir. 1995). The "agency must have examined the relevant data and have articulated a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." Motor Vehicles Mfrs. Ass'n of the United States, Inc., 463 U.S. at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168, 83 S. Ct. 239, 245-246, 9 L. Ed. 2d 207 (1962)). The agency may not rely on post-hoc rationalizations or justifications in support of its decisions. Id. Nor "ignore evidence placed before it by interested parties." Consumer Union of the U.S., Inc. v. Consumer Product Safety Commission, 491 F.2d 810, 812 (2nd Cir. 1974). If the agency's determination cannot be sustained based upon the record, then it must be remanded for further consideration. Camp v. Pitts, 411 U.S. 138, 143, 93 S. Ct. 1241, 1244, 36 L. Ed. 2d 106 (1973).

It is within this narrow scope of review that the motions for summary judgment must be decided. Under Fed.R.Civ.P. 56(c), summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue

as to any material fact that the moving party is entitled to judgment as a matter of law." In essence, Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The Court must view the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. Bender v. Southland Corp., 749 F.2d 1205, 1210-1211 (6th Cir. 1984). However, the Court is not permitted to judge the evidence or make findings of fact. Ivy Street Corporation v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987).

The movant bears the burden of demonstrating the absence of all genuine issues of material fact. This burden may be discharged by showing there is an absence of evidence to support the nonmoving party's case. Celotex Corp., 477 U.S. at 325. Once the moving party discharges this burden, it then shifts to the nonmoving party to present specific facts showing a genuine triable issue. Fed.R.Civ.P, 56(e). To create a genuine issue of material fact, the nonmoving party must produce evidence sufficient to require submission of the issue to a jury. Lucas v. Leaseway Multi Transp. Serv. Inc., 738 F. Supp. 214, 217 (E.D. Mich 1990).

V. DISCUSSION

Plaintiff contends that the COE has no jurisdiction over the property because it is an isolated wetland that is

unconnected to any navigable waters of the United States or to any tributary or watershed of such waters.

Plaintiff argues that the COE must establish that the Sutherland-Oemig Drain is navigable or that the Drain is a tributary of the waters of the United States to establish jurisdiction. Plaintiff claims that the Supreme Court's decision in Solid Waste Agency of Northern Cook County v. United States Corps of Engineers, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) ("SWANCC") reaffirmed that the scope of the Clean Water Act ("CWA") and its attendant regulations is limited to the waters and wetlands that have some tangible connection to the navigable waters of the United States. Plaintiff asserts that the CWA only applies to bodies of water of the United States by surface water connections, ground water connections, or both.

The Defendants argue that both the unnamed Ditch and the Sutherland-Oemig Drain are tributaries under 33 C.F.R. § 328.3(a)(5), and contend that SWANCC is not applicable because Plaintiff's property is not isolated, and contends that SWANCC does not hold that a direct hydrological connection is required to establish jurisdiction based on adjacency. Section 404(a) of the CWA, 86 Stat.884, as amended, 33 U.S.C. § 1344(a), regulates the discharge of dredged or fill material into "navigable waters." The statute defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2002).

The COE's definition of waters of the United States is found 33 C.F.R. § 328.3:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

Prior to SWANCC, a majority of courts held that the jurisdiction of the CWA extended to wetlands which were adjacent to non-navigable tributaries which flowed into navigable waters. See United States v. Pozsgai, 999 F.2d 719 (3rd Cir. 1993); Quivira Mining Co. v. EPA, 765 F.2d 126 (10th Cir. 1985) cert. denied, 474 U.S. 1055, 106 S. Ct. 791, 88 L. Ed. 2d 769 (1986); United States v. TGR Corp., 171 F.3d 762 (2nd Cir. 1999); United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (6th Cir. 1974).

In January of 2001, the Supreme Court issued its decision in SWANCC. SWANCC involved a consortium of twenty-three suburban Chicago cities and villages that purchased an abandoned mining site to use for disposal of baled nonhazardous solid waste. Because the site required the filling of permanent and seasonal ponds which existed on the property, a request was made of the COE to determine whether a landfill permit was required under § 404(a) of the CWA, 33 U.S.C. § 1344(a). The COE determined that the site qualified as 'waters of the United States' and asserted jurisdiction under the Migratory Bird Rule, 51 Fed.Reg. 41217 (1986), and denied SWANCC a § 404(a) permit. SWANCC sued the COE arguing that the COE had exceeded their statutory authority in interpreting the CWA to cover non-navigable, isolated, intrastate waters based upon the presence of migratory birds.

The Supreme Court held that 33 C.F.R. § 328.3(a)(3) (1999), as clarified and applied to Plaintiff's balefill site

pursuant to the 'Migratory Bird Rule,' 51 Fed.Reg. 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA.

In reaching its decision, the Court evaluated the meaning of § 404(a) and stated:

This is not the first time we have been called upon to evaluate the meaning of S 404(a). In United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985), we held that the Corps had S 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. In so doing, we noted that the term "navigable" is of "limited import" and that Congress evidenced its intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." Id., at 133, 106 S. Ct. 455. But our holding was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters. See id., at 135-139, 106 S. Ct. 455. We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetland "inseparably bound up with the 'waters' of the United States." Id., at 134, 106 S. Ct. 455.

It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in Riverside Bayview Homes. Indeed, we did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water ...." Id., at 131-132, *168.

In declining to extend its ruling in Riverside Bayview Homes, the Court stated:

We thus decline respondents' invitation to take what they see as the next ineluctable step after Riverside Bayview Homes: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under S 404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute ... does not have any independent significant." Tr. of Oral Arg. 28. We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in Riverside Bayview Homes that the word "navigable" in the statute was of "limited import." 474 U.S., at 133, 106 S. Ct. 455, and went on to hold that S 404(a) extended to non-navigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made. See, e.g., United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-408, 61 S. Ct. 291, 85 L. Ed. 243 (1940).

The ruling in SWANCC created a split among courts as to how the ruling should be interpreted. Some courts have interpreted SWANCC to limit jurisdiction under the CWA. Courts adopting this interpretation take the

position that a "body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." See Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001); United States v. Rapanos, 190 F. Supp.2d 1011 (E.D. Mich 2002; United States v. RGM Corporation, 222 F. Supp.2d 780 (E.D. Virginia 2002); United States v. Newdunn Associates, 195 F. Supp.2d 751 (E.D. Virginia 2002).

Other courts maintain that SWANCC has not altered the jurisdiction of the CWA. They view the Court's ruling in SWANCC to be very narrow, and interpret SWANCC as applying only to isolated waters which have no hydrological connection to navigable waters. See Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001); United States v. Interstate General Co., 152 F. Supp.2d 843 (D. Md. 2001); United States v. Buday, 138 F. Supp.2d 1282 (D. Mont. 2001); United States v. Lamplight Equestrian Center, Inc., 2002 U.S. Dist. LEXIS 3694, 2002 WL 360652 (N.D. Ill. 2002).

Plaintiff urges the Court to adopt the interpretation of the Fifth Circuit and other courts which find that no jurisdiction exists under the CWA unless the body of water is actually navigable or adjacent to an open body of navigable water. I decline to do so because I am not convinced that Plaintiff's interpretation of SWANCC is correct. I am more persuaded by the reasoning of the courts which have concluded that the Court's ruling in SWANCC was narrow, and did not substantially narrow the jurisdiction of the COE under the CWA.

In Lamplight Equestrian Center, Inc., Id., the Court summarized the rulings of a number of courts that declined to read SWANCC as a broad reduction of the COE's authority to regulate waters under the CWA. The Court determined that the critical issue which ran through this case was whether a nexus existed between the property and the relevant interstate water. The Court stated:

"This court finds the reasoning of the cases following Headwaters persuasive, and agrees with those courts that SWANCC did not effect so substantial a change in the Corps' jurisdiction. Much of the SWANCC opinion has no direct relevance here because that case involved isolated waters lacking a physical/hydrological connection to other navigable waters. The SWANCC decision acknowledged that "it was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the [Act] in Riverside Bayview Homes." SWANCC, 531 U.S. at 167. Thus, in this court's view, the critical issue is whether there is a "significant nexus" between the Property's wetlands and the Fox River."

Plaintiffs' property in this case is not isolated. It is undisputed that the property is adjacent to an unnamed ditch, and that the ditch connects to the Sutherland-Oemig Drain. (Tr. 55-61). The Drain, which neighbors a corner of the property, connects to Lake St. Clair. (Tr. 54).

The COE claims jurisdiction over the property because the Corps' definition of "waters of the United States" includes "wetland adjacent" to other categories of

waters of the United States, including tributaries. 33 C.F.R. § 328.3(a)(7).

Plaintiff claims that both the ditch and the Drain are not tributaries because they are not navigable. Plaintiff also argues that there is insufficient evidence that the waters from the ditch flow into the drain, and therefore, the ditch cannot be a tributary. Plaintiffs' argument is not supported by the case law, including SWANCC.

In United States v. Ashland Oil and Transportation, 504 F.2d 1317 (6th Cir. 1974), the court held that Congress had constitutional authority under its interstate commerce powers to prohibit discharge of pollutants into non-navigable tributaries of navigable streams.

In Headwaters, Inc., Id., the court quoted from the Eleventh Circuit's decision in United States v. Eidson, 108 F.3d 1336, 1342 (11th Cir. 1997) in holding that ineqation canals were "waters of the United States," and thus subject to the CWA. In Eidson, the court stated:

"Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage. It makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in a traditional sense. Rather, as long as the tributary would flow into the navigable body [under certain conditions], it is capable of spreading environmental damage and is thus a "water of the United States" under the Act."

Eidson, 108 F.3d at 1342.

The court in Headwater, Inc., Id., listed other decisions reaching the same conclusions; Driscoll v. Adams, 181 F.3d 1285, 1291 (11th Cir. 1999)(small volume stream running only intermittently is "navigable water"); Quivira Mining Co. v. United States Envtl. Prot. Agency, 765 F.2d 126, 130 (10th Cir. 1985) (creeks and arroyos connected to streams during intense rainfall are "waters of the United States"); United States v. Interstate Gen. Co., 152 F. Supp.2d 843, 847 (D Md. 2001)(describing SWANCC as a narrow holding "limited to the Migratory Bird Rule and not affecting regulations defining "non-navigable tributaries and streams" as waters of the United States.").

Even the decision in SWANCC lends no support to Plaintiff's argument. In his dissenting opinion, Justice Stevens stated:

"In its decision today, the Court draws a new jurisdictional line; one that invalidates the 1986 Migratory Bird regulation as well as the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each." SWANCC, 531 U.S. at 176.

He went on to state that:

"Even if the majority were correct, that Congress did not extend the Corps' jurisdiction in the 1972 CWA to reach beyond navigable waters and their non-navigable tributaries. Congress' rejection of the House's efforts in 1977 to cut back on the Corps' 1975 assertion of

jurisdiction, clearly indicates congressional acquiescence in that assertion. Id., at 184."

Justice Stevens also stated:

"But the Court ignores the provisions legislative history, which makes clear that Congress understood § 404(g)(1) - and therefore, federal jurisdiction - to extend, not only to navigable waters and non-navigable tributaries, but also to "isolated" waters, such as those at issue in this case. Id., at 187.

It is clear from Justice Stevens dissent that the court was not negating the Corps' jurisdiction over non-navigable tributaries of navigable waters.

In Riverside Bayview Homes, Inc., 474 U.S. at 134, the court stated:

"In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source on the adjacent bodies of water. Again, we cannot say that the Corps' judgment on these matters is unreasonable, and we therefore conclude that the definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction, is a permissible interpretation of the Act."

I conclude, therefore, that because Plaintiffs' property is adjacent to neighboring tributaries of navigable waters and has a significant nexus to "waters of the United States," it is in fact not isolated, and is subject to the jurisdiction of the CWA. Plaintiffs' argument

concerning the Commerce Clause, which is dependant on the property being isolated, therefore is not applicable.

Plaintiffs' final argument is that the COE erred in rejecting the application on the merits. Plaintiff argues that in denying the permit, the Corps emphasized that the property was an important part of the Lake St. Clair watershed and fulfilled important functions in drainage, filtering and flood control. Plaintiff maintains that the property does not fulfill any of those functions.

Plaintiff also argues that the mitigation proposed by the Plaintiffs as part of their application would actually promote the drainage and filtering functions more effectively than maintenance of the property in its current form.

Plaintiff also takes issue with the Corps' determination that Plaintiff confine the construction of the condominiums to the upland portion of the property, or establish why they cannot purchase an alternative parcel of land elsewhere in Macomb County. Plaintiff claims that the administrative record demonstrates that there is no appropriately zoned property available in Macomb County, and suggests that it is unfeasible to build a 112-unit condominium on less than four acres of upland on the property.

The COE made the following relevant findings in its permit evaluation of Plaintiff's property:

Shoreline Erosion and Accretion Effects:

The project would eliminate the potential ability of the wetland to act as a sediment catch basin. Increased

runoff due to the filling of the wetlands and creation of impervious surfaces, i.e., condominiums, driveways, roads, etc., could increase erosion and/or sedimentation in the S-O Drain, Auvase Creek, and Lake St. Clair. The proposed deforestation and removal of two to three feet of wetland soils to create an emergent wetland within the 3.74 acres of remaining existing forested wetlands (the proposed mitigation) may provide some storm water retention; however, the storm water detention basin proposed for the center of the complex would empty into these significantly smaller areas, quickly overtopping them. These wetlands would then empty into the drain and most functions served by the existing forested wetlands would not be replaced. The project would contribute to increased runoff and would likely result in increased erosion and accretion along the drain and further downstream in Auvase Creek.

In summary, the project will have minor, long term, negative impacts on erosion/accretion. The cumulative impacts of numerous such projects would be major and negative as fewer and fewer wetlands remain in Chesterfield Township to function as sediment basins resulting in greater flooding events of local drains and streams thereby increasing erosion and/or accretion problems.

The negative impacts would be avoided if the permit were denied. A modified permit which minimized the fill area and offset runoff detention may decrease impacts to downstream erosion/accretion; however, when taking into consideration the cumulative impacts of similar activities which have occurred in this watershed, such a modified permit would require a

significant reduction in the area of fill to reduce those impacts to a minor level.

Effects on Flood Hazards and Floodplain Values:

The proposed project would aid in the prevention of flooding for the applicant and authorization of such a project would encourage the applicant to invest in a parcel that shows evidence of flooding/standing water conditions. Because there is limited acreage remaining in the Chesterfield Township area which provides for storm water storage and delayed release of these waters, it is likely that the downstream areas will see an increase in possible flooding magnitude and frequency. This is due to the fact that there will be a net increase in runoff since the parcel is not currently a part of the S-O Drain watershed. Construction of the project and similar projects could have detriments to downstream residents.

The proposed deforestation and removal of two to three feet of wetland soils to create an emergent wetland within the 3.74 acres of remaining existing forested wetlands (the proposed mitigation) may provide some storm water retention; however, the storm water detention basin proposed for the center of the complex is proposed to empty into these significantly smaller areas, which will quickly exceed their storage capacity. These wetlands would then empty into the drain and the functions of water storage (from precipitation) served by the existing forested wetlands to would not be replaced (See drawing Pages 4-8 of Enclosure 1).

In summary, the project will have minor, short term and long term, negative impacts on flood hazards and

floodplain values. The cumulative impacts of numerous such projects would be major and negative. The negative impacts would be avoided if the permit were denied.

The applicant did not adequately address avoidance of wetlands, the first necessary sequence in the Section 404(b)(1) guidelines. As their alternative analysis, the applicant submitted contested case hearing transcripts indicating there is only one other parcel in Chesterfield Township zoned for multi-family development. They did not explain why they could not pursue use of this parcel. They also failed to address the availability of other upland parcels, the possibility of seeking and being granted zoning variances within the Township, the use of several smaller parcels instead of one large parcel, or change in design to fit the available zoning. This presumption must be overcome before moving to the second hurdle in the Guidelines. n8

Section 404 of the CWA, authorizes the COE to issue a permit to allow discharge of dredged or fill materials into those waters governed by the Act. The Section 404 permit process is governed concurrently by COE guidelines, 33 C.F.R., Parts 320-329, and by EPA guidelines, 40 C.F.R. Part 230. Friends of the Earth v. Hintz, 800 F.2d 822 (9th Cir. 1986).

Section 320.4 of 33 C.F.R. sets forth the general policies that guide the COE in its evaluation of the permit applications for fill activities. The regulations require the COE to conduct a public interest review, balancing the "benefits which reasonably may be expected to accrue from the proposal against the reasonably foreseeable detriments," with consideration for the

"national concern for both protection and utilization of important resources." Id., § 320.4(a)(1). A permit is to be granted unless it is determined that issuance would be contrary to the public interest. Id.

A Section 404 Permit must comply with relevant EPA regulations. Id. EPA regulations provide that "no discharge of dredged or fill material shall be permitted if there is a practical alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a).

Under 40 C.F.R. § 230.10(a)(3), where the activity associated with a discharge which is proposed for a special aquatic site, does not require access or proximity to or sitting with the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependant"), practical alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the purposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem unless clearly demonstrated otherwise.

Plaintiffs' proposed condominium project is not water dependant, therefore, a practical alternative is presumed to be available. The administrative record establishes that Plaintiff never sought out, or investigated that site. Although Plaintiffs' witnesses' testified as to no other property available other than

that parcel, not one witness testified that an investigation was undertaken to determine if the available parcel was a suitable alternative. The COE provided a rational basis for its decision regarding the possibility of a practical alternative, and I cannot conclude that the decision was arbitrary or capricious.

I also conclude that the COE provided a rational basis for their decisions concerning shoreline erosion and accretion effects, flood hazards, and floodplain values. The Court is reminded that it is not to substitute its own judgment for that of the agency; as long as the agency provides a rational explanation for its decision. Citizens to Preserve Overton Park, Inc., 401 U.S. at 416.

III. CONCLUSION

For the reasons stated above, it is respectfully recommended that Plaintiffs' Motion for Summary Judgment be DENIED, and the Defendants' Motion for Summary Judgment be GRANTED.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1), the parties are hereby notified that within ten days after being served with a copy of this recommendation that they may serve and file specific, written objections to the proposed findings and recommendations. Further, either party may respond to another party's objections within ten days after being served with a copy thereof. The parties are further informed that failure to timely file objections may constitute a waiver of any further right of appeal to the United States Court of Appeals. United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

In accordance with the provisions of Rule 6(b) of the Federal Rules of Civil Procedure, the Court, in its discretion, may enlarge the period of time in which to file objections to the report.

WALLACE CAPEL, JR.

UNITED STATES MAGISTRATE JUDGE

Date: 2-28-03

Footnotes

n1 To the extent that the development of the property allowed water from adjacent areas to drain across the property, the retention ponds would filter this water as well. (MDEQ Proposed Decision at 10).

n2 Plaintiff's Statement of Facts is taken verbatim from their Motion for Summary Judgment, pages 2-9.

n3 The Plaintiffs in their brief seem to have confused the unnamed ditch with the Sutherland-Oemig Drain. See, e.g., Carabell Brief at 2-3; 5-6. There are, in fact, two bodies of water, and the wetlands are adjacent to both. The unnamed ditch runs along the hypotenuse of the triangular-shaped property and is part of the property. It connects to the Sutherland-Oemig Drain, which passes by the northeast corner of the property on its way to Auvase Creek.

n4 The Corps also administers Section 10 of the 1899 Rivers and Harbors Act for structures or work in or affecting "navigable waters of the United States." These are waters that are, have been, or are susceptible for use to transport interstate or foreign commerce. 33

C.F.R. § 329.4. The Corps is required to keep a listing of such waters (33 C.F.R. § 329.16) and Lake St. Clair appears on this list.

n5 The District has also based jurisdiction on the Commerce Clause because of the presence of migratory birds on the property. Due to the decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC"), 531 U.S. 159, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001), this basis of jurisdiction is no longer applicable.

n6 In 1987, the Carabells originally applied to the Michigan Department of Environmental Quality, ("MDEQ") for a permit to discharge fill material on the property for construction of a 200 unit condominium complex. However, the history and findings of the state proceedings are immaterial to this action, which is entirely based upon the administrative record established after EPA sustained their objections to the issuance of a State permit and Section 404 permit authority was transferred from the State to the Corps pursuant to CWA Section 404(j) and 40 C.F.R. § 233.50(j). AR Vol. 1, Doc. 89, at 1.

n7 SWANCC was decided on January 9, 2001, subsequent to the October 5, 2000 permit denial.

n8 Taken verbatim from the Permit Evaluation, Administrative Record, Volume 2, Document 17, pgs. 10, 11, 23, and 24.

ADMINISTRATIVE APPEAL DECISION

KEITH & JUNE CARABELL,
FILE NO. 99-250-002-1

DETROIT DISTRICT

MARCH 5, 2001

Review Officer: Suzanne L. Chubb, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio.

Appellant Representative: Mr. Timothy A. Stoepker, Dickinson Wright PLLC, 500 Woodward Avenue, Suite 4000, Detroit, Michigan 48226 -3425.

Permit Authority: Section 404 of the Clean Water Act (33 USC 1344)

Receipt of Request For Appeal (RFA): December 4, 2000

Appeal Conference Date: January 30, 2001

Site Visit Date: Same

Background Information: The appellant proposes to construct a 112-unit townhouse condominium development on a 19.6-acre triangular-shaped parcel-located in Chesterfield Township, Macomb County, Michigan: A county drain follows the. hypotenuse side of the property on a northeast-southwest alignment. A small amount of upland is located in the southwest corner of the parcel and along the ditch." The appellant

proposes to place fill into approximately 15.9 acres of wetland and convert approximately 3.7 acres of forested wetland to emergent and open-water cover types as mitigation (enhancement).

Following Michigan Department of Natural Resources (MDNR) permit reviews in 1993 and 1994 with subsequent permit denials; a Michigan Department of Environmental-Quality (MDEQ) administrative law judge ruled in favor of a modified project design in September 1998 and ordered the issuance of a State permit. The United States Environmental Protection Agency (USEPA) sustained their objections to issuance of a. permit and, pursuant to Section 404(j) of the Clean Water Act and 40 CFR 233.50(j), Section 404 permit authority was transferred from the MDEQ to the Army Corps of Engineers (Corps).

The appellant subsequently filed an application dated 19 August 1999 with the Detroit District (District). The District published a public notice (PN) on 8 February 2000 and conducted three site visits on 12 October 1999, 5 May 2000 and 2 August 2000. Following the review period, the application was denied on 5 October 2000. The appellant submitted a RFA to the Division on 4 December 2000.

Summary of Decision: I find that this RFA has no merit. The onsite wetland is regulated because it is adjacent to a tributary system of Lake St. Clair. Further, under the Clean Water Act (CWA), the permit issuance decision by the MDEQ administrative law judge does not bar Federal review and jurisdiction. The District completed a fair and reasonable review of

the appellant's application in accordance with all applicable laws and regulations.

Appeal Evaluation, Findings and Instructions to the Detroit District Engineer (DE):

Reason l.: The Corps has no jurisdiction over the land at issue.

Finding: Reason I of this appeal has no merit.

Action: No action required.

Discussion: The appellant considers the onsite wetland to be isolated and therefore non-jurisdictional based on current USEPA and Corps regulations at 40 CFR 230.3(s) and 33 CFR 328.3 respectively and the recent U.S. Supreme Court ruling in Solid Waste Agency of Northern Cook County (SWANCC) v U.S. Arm Corns of Engineers. The appellant also does not consider the onsite ditch to be waters of the United States. The appellant requested that the Corps identify the section or provision of the Clean Water Act (CWA) that provides for Corps jurisdiction of wetlands not directly adjacent to navigable waters and for tributaries to navigable waters.

Under the Federal Water Pollution Control Act (FWPCA) amendments of 1972 (Public Law 92-500), Congress extended Corps' regulatory jurisdiction beyond the traditional "navigable waters" to include "all waters of the United States", including wetlands (33 U.S.C. 1362). In 1977, the FWPCA was further amended and renamed the Clean Water Act. Title 33 U.S.C. 1344 (also known as Section 404) requires a

permit from the Secretary of the Amy for discharges of dredged or fill material into "all waters of the United States." The statutory authorities under which the Corps implements.its regulatory program are found at 33 CFR 320.2 and the policies, practices, and procedures followed by the Corps in connection with the review of permit applications to authorize the discharge of dredged or fill material into waters of the United States pursuant to Section 404 are found at 33 CFR 323.

"Waters of the U.S." include traditional navigable waters and their tributaries, adjacent wetlands and isolated waters with an interstate commerce nexus. "Adjacent" means bordering, contiguous or neighboring and includes wetlands separated from other waters of the U.S. by a man-made dike or barrier, natural river berms, beach dunes and the like (33 CFR 328). "Isolated waters" are defined as non-tidal waters of the U.S. that are 1) not part of a surface tributary system to interstate or navigable waters of the U.S.; and 2) not adjacent to such tributary waterbodies (33 CFR 330.2). A ditch excavated in a water of the U.S. (wetland or stream) remains a regulated water of the U.S. provided an Ordinary High Water mark is present. A ditch constructed wholly within upland is generally not a water of the U.S. (Preamble to 2000 Nationwide Permit Regulations, 65 FR 12823).

In this case, the District determined that the onsite wetland was adjacent to a surface tributary system of a navigable waterway, Lake St. Clair. Specifically, the project manager observed that the onsite county ditch flowed into the Sutherland-Oemig Drain, which flows into Auvase Creek, which outlets into Lake St Clair.

The ditch appears to have been excavated in wetland based upon the adjoining onsite wetlands and the identification of poorly drained hydric soils (Toledo silty clay loam, 0-2% slopes) by the U.S. Department of Agriculture, Natural Resources Conservation Service (Macomb. County Soil Survey, 1971). The appellant's wetland consultant delineated the ditch as wetland. Spoil material from the excavated ditch was sidecast into berets on both sides of the ditch. However, the man-made spoil berm that separates the wetland from the ditch does not exclude adjacency as described above. Construction of the ditch is thought to have occurred some fifty to sixty years ago, prior to CWA jurisdiction.

One confusing aspect of the ditch is the direction of water flow. The appellant's wetland consultant believed it flowed in a southwesterly direction away from the Sutherland-Oemig Drain while the District project manager (PM) observed it flowing northeasterly during a site visit. The PM also remarked during the appeal site visit that he thought the drainage was more "feathery" (diffuse, less defined) to the southwest. A review of the spot elevations on Sheet 1 of the appellant's grading plan, dated 12 August 1999, does not clarify the issue. The last bottom elevation of the ditch at the southwest property corner is 584.50 feet U.S. Geological Service (USGS) datum and 584.40 feet at the northeast corner. The lowest elevation is 583-90 feet, noted at two locations along the ditch northeast of its midpoint along the property line.

Although confusing, the appellant has not presented any information to refute the District's evaluation. Furthermore, even if I assume that the ditch flows in a

southwesterly direction, the USGS topographical map, New Haven quadrangle, appears to indicate. that the ditch is connected to other ditches that outlet to Auvase Creek and eventually Lake St. Clair. This decision does not prevent the appellant from presenting new information to the District for reconsideration of their original determination.

The District also performed a site visit in May 2000 [Environmental Assessment (EA) enclosure 16] to document migratory bird use and their connection to interstate commerce: The recent U.S. Supreme Court ruling (SWANNC v. Corps) negated use of the Migratory Bird Rule to establish an interstate commerce connection on isolated, intrastate waters. The SWANNC decision is not relevant to this proposal because the subject wetlands are not isolated.

Finally, although not raised in the RFA, during the appeal conference the appellant questioned a statement made by the District in the decision document. The District suggests that Section 10 jurisdiction from Lake St. Clair may extend upstream on its tributaries (Auvase Creek and the Sutherland-Oemig Drain) to 23-Mile Road as it does on the Salt River, an established federally navigable waterway (EA paged). The administrative record does not support this statement. The Ordinary High Water elevation for Lake St. Clair is 576.3 feet International Great Lakes Datum (IGLD), 1985, and the bottom elevation of the onsite ditch at the northeastern end is 583.7 feet IGLD, 85 (converted from 584.4 feet USGS Datum) This statement may be supported by bottom elevations for the nearby Sutherland-Oemig Drain but they are absent from the administrative record. However, the District's

statement is irrelevant to the jurisdictional determination made by the District and to the discussion above.

Reason 2: The issues presented in the Carabell's RFA were already decided by the MDNR in favor of the Carabells, so the Corps and the USEPA are barred by res judicata from deciding against the Carabells.

Finding: Reason 2 of this appeal has no merit.

Action: No action required.

Discussion: The appellant believes that the State of Michigan, while administering the Section 404 program, was acting on behalf of the federal government. The USEPA, pursuant to Section 404(g) and 40 CFR 233, formally transferred administration of the Section 404 permit program to the State of Michigan through a Memorandum of Agreement (MOA) signed in 1983. However, under Section 404(j), the State must still coordinate with the USEPA on certain classes and categories of activities. Because theappellant's proposed discharge of fill material exceeded 10,000 cubic yards, the subject application was not waived from the requirements of Section 404(j). The USEPA responded to the State's public notice with a letter of objection dated 4 March 1994. Regulations at 40 CFR 233.50(j) clearly state that if the State neither satisfies EPA's objections nor denies the permit, processing of the Section 404 permit application reverts to the Secretary of the Army, acting through the Chief of Engineers.

Following issuance of a State permit, pursuant to an administrative court order, the USEPA sent a letter dated 23 November 1998 that sustained their objections to the project. This effectively transferred Section 404 permitting authority to the Corps pursuant to the aforementioned regulations.

Res judicata is not an applicable legal principal here. There has been no preceding decision or judgment regarding this permit Application in a federal forum. The State of . Michigan followed its own program procedures by conducting an administrative hearing.

The USEPA objected to the result. When the USEPA objects to the State's issuance of a permit, and the State does not revise the permit (or deny it) in accordance with the stated objections, both Section 404(j) of the CWA and 40 CFR 233.50(j) require the. Administrator of the EPA to turn over the permit application to the Secretary of the Army so that the Secretary can process the permit application. The MOA between the State and the USEPA merely implements the statute and regulation.

Reason 3: The Carabells have demonstrated that a permit can be issued under the applicable laws and regulations.

Finding: Reason 3 of this appeal has no merit.

Action: No action required.

Discussion: In the RFA, the appellant states that the primary factors in the District's denial decision are valuable seasonal habitat and water storage functions

from the public interest review. While the District's 5 October 2000 letter does mention these factors, the letter also states that the denial is based on non-compliance with the USEPA's 404(b)(1) Guidelines. The presence of potential habitat and use of the site by the Indiana bat (Myotis sodalis) and possible consultation with the United States Fish and Wildlife Service (USFWS) pursuant to the Endangered Species Act is also unresolved. Therefore, the appellant has not shown compliance with all applicable laws and regulations.

The District conducted a fair and adequate public interest review. They published a PN, considered all comments received and documented their evaluation of the applicable public interest review factors. Besides the effects on wildlife habitat and water quality, the District also noted that the project would have a major, long-term detrimental effect on wetlands, flood retention, recreation and conservation and overall ecology. The District did err when they stated that the proposed storm water detention basin would outlet into the proposed mitigation areas. The proposed project drawings show that the detention basin would outlet to the county ditch. This error is present under several EA headings including Operational Impacts on Water Quality, Shoreline Erosion and Accretion, Flood Hazards and Floodplain Values, and Effects on Wetlands, and is implied in Effects on Aquatic Biota. However, although this misconception was a factor in the District's evaluation of the aforementioned public interest factors, this error is harmless because it, alone, is not the sole or overwhelming basis of the District's denial decision.

The District acted appropriately in finding that the appellant has not demonstrated that the proposal is the least environmentally damaging practicable alternative. A housing project is a non-water dependent activity and does not require siting in a wetland.

During the State administrative hearing, Mr. Patrick Meagher, the planning consultant for Chesterfield township, stated that, besides the project site, another undeveloped property is zoned RM-3 (multifamily development) within Chesterfield township (Transcript page 166). At the appeal conference, the appellant stated that this parcel was not considered in their alternatives analysis because it would mean "abandoning" the project parcel. The appellant only examined oh-site alternatives and those did not result in a measurable decrease in wetland impacts. Additional properties may also be available if re-zoned for RM-3 development. A permit cannot be issued when a less environmentally damaging practicable alternative exists or when insufficient information is provided to determine compliance [40 CPR 230.12(a)(3)].

Although the appellant has not demonstrated avoidance and minimization of aquatic impacts, the District also determined that the proposed mitigation was inadequate. They found that the conversion of 3.7 acres of onsite forested wetland to emergent and open water cover types would not replace the wetland functions lost due to the proposed fill activities. Thd District did not consider alternative mitigation proposals that may be acceptable because earlier steps in the Guidelines sequence (avoidance and minimization) had not been

adequately addressed. The appellant bears the burden of proof to demonstrate compliance with the Guidelines.

Conclusion: For the reasons stated above, I conclude that the three reasons presented in this Request For Appeal do not have merit.

ROBERT H. GRIFFIN
Brigadier General, U.S. Army
Commanding

CELRE-ET-RG 99-250-002-1 (1145b) October 5, 2000

MEMORANDUM FOR Record

SUBJECT: Statement of Findings on Proposed Discharge in wetlands at Chesterfield Township, Michigan by Keith and June Carabell

1. Reference attached Environmental Assessment (EA) on the proposed work.

2. Summary/Remarks:

The agent for the applicant went on record, on two separate occasions as stating that the project is not within a state, or federally-regulated wetland (See EA Enclosures 12 (Pg. 2, Para. 2.a.) and 13 (Pg. 1, 2nd Para.)). The record clearly establishes the site as being used for interstate commerce (neo-tropical migratory bird stopping point) and as adjacent to a drain which empties directly into a Section 10 water (See Encl. 16).

The applicant offered an exchange of 3.74 acres of forested wetlands with the same acreage of emergent wetland as mitigation for the 15.87 acres proposed to be eliminated through the discharge of fill material. compensation is the final step in the sequence of avoidance, minimization and compensation. Since the presumption of avoidance has not been addressed and satisfied, the offer of compensation is premature.

The project will destroy one of the last remaining forested wetlands in Chesterfield Township, and one of the last remaining large forested tracts of land in not only the Township, but also in Macomb County. Areas

such as this forested wetland provide invaluable habitat for resident and neo-tropical migrant birds, as well as to the dwindling populations of small and large mammals in the area. Cumulatively, this and similar projects are resulting in increases in flood duration and frequency and a contribution to the degradation of water quality in the Lake St. Clair watershed. Public recreation will suffer through a reduction in populations of birds and mammals, many of which are fed and/or photographed by people in this highly developed area. Although one of the applicant's expert witnesses in the contested case hearing states that a recent study reveals a need for 150 senior units within Chesterfield Township, at no time during the processing of this permit application did the applicant, or his agent, indicate the purpose of the work was to construct senior housing. Regardless, we presume that there is a less damaging alternative.

3. Conclusions and Determinations:

a. Compliance with the Section 404(b) (1) Guidelines of the Clean Water Act: The proposed discharge fails to comply with the Guidelines.

4. Public Interest Determinations.

I determined that the project would have minor, long-term benefits to the economy of the area, as well as the applicant, and to property ownership. I determined that the project would have major, long-term detriments to water quality, flood hazards, aquatic and terrestrial biota, recreation, and conservation and overall ecology. MDEQ has issued their respective permit, and this reflects positively on the factor of land use.

Weighing the minor benefit's that may be reasonably expected to accrue from this project against its reasonably foreseeable detriments, I determined that the detriments greatly outweigh the benefits to the overall public interest. Although MDEQ issued a state permit, land use benefits are outweighed by the total detriments to other national public interest factors. The cumulative impacts of this, and other similar projects, would impact wildlife habitat, and increase flood hazards, as well as negatively impact the water quality of the receiving water. These become issues of overriding national importance and require a more stringent evaluation of alternatives and of minimization of impacts. The detriments of the project are therefore significant issues of overriding importance since they outweigh the benefits.

I have determined that the U.S. Department of the Interior, Fish and Wildlife Service (FWS) request that a survey to determine the presence of Indiana bat (Myotis sodalis) or its potential habitat is unwarranted at this time. Consultation must be completed when, as a result of a federal action (in this case, issuance of a Section 404 permit), the Corps of Engineers makes an EFFECT determination. In this case, denial is overwhelming, as issuance of the requested permit would not be in the public interest. Therefore, resolution of this issue is unnecessary. Should the applicant provide compelling reason why a permit should be issued, or submit a plan which significantly reduces impacts to the aquatic environment to a minimal level, the District will conduct consultation with the FWS.

5. Decision:

Review of this application has included all policies of paragraph 320.4, "General Policies for Evaluating Permit Applications." I have concluded that the determination as to denial of the requested permit is within my authority as set forth in 33 CFR Part 325.8. The proposal is contrary to the public interest and denial of the permit is appropriate, even though this decision is contrary to a state decision.

a. The requested permit is denied.

b. The applicant be notified of the decision.

RICHARD J. POLO JR.
LTC EN
Commanding

DEPARTMENT OF THE ARMY
DETROIT DISTRICT CORPS OF ENGINEER
BOX 1027
DETROIT, MICHIGAN 48231-1027

October 5, 2000

IN RELPY REFER TO

Engineering & Technical Services
Regulatory Office
File No. 99-250-002-1

Keith and June Carabell
c/o Tim Stoepker
Abbott, Nicholson, Quilter, Esshaki
and Youngblood
300 River Place, Suite 3000
Detroit, Michigan 48207

Dear Mr. and Mrs. Carabell:

I have reached a decision on your application for a Department of the Army permit to discharge fill material for construction of a condominium development in wetlands at Chesterfield Township, Michigan. After due consideration of the record and the appropriate regulations, I have determined that the project is contrary to the overall public interest, and have decided to deny your request for a permit.

Your parcel is primarily a forested wetland that provides valuable seasonal habitat for aquatic organisms and year round habitat for terrestrial organisms. Additionally, the site provides water

storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oernig Drain, Auvase Creek, and Lake St. Clair. The minimization of impacts to these wetlands is important for conservation and the overall ecology of the region. Because the project development area is a forested wetland, the proposed project would destroy the resources in such a manner that they would not soon recover from impacts of the discharges. The extent of impacts in the project area when considered both individually and cumulatively would be unacceptable and contrary to the public interest.

This decision was also based on an evaluation of the project's compliance with the 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material. The Guidelines were developed by the U.S. Environmental Protection Agency pursuant to the 1977 Clean Water Act, and they establish criteria for evaluating proposed projects. The Corps of Engineers is obligated to deny applications for discharges when work does not comply with the Guidelines. One critical threshold of the Guidelines is a thorough consideration of less damaging practicable alternatives. For projects such as yours, the Guidelines require that we presume that less damaging alternatives are available unless clearly demonstrated otherwise. You have not overcome this presumption, and therefore your project does not comply.

One apparent less damaging alternative would be to purchase an upland, or primarily upland, parcel of property elsewhere in the Chesterfield Township area that maybe zoned or re-zoned for multi-family

residential development. There may be other less damaging alternatives, as well. If there prove to be none, we would give favorable consideration to a project that significantly reduces impacts to the forested wetland on your property, such as construction along Donner Road that utilizes the upland to the maximum extent possible. We would also require the mitigation to provide for the complete functional replacement of the forested wetlands proposed for development.

You are hereby notified that you and/or your authorized agent(s) may appeal a denied individual permit under the Corps of Engineers Administrative Appeals Process. Should you wish to appeal this decision, you must fill in and submit the enclosed Request for Appeal (RFA) within 60 days of the date of this letter. Your RFA must be submitted to the division engineer at:

Brigadier General Robert H. Griffin
U.S. Army Corps of Engineers
Lakes & Ohio River Division
P.O. Box 1159
Cincinnati, Ohio 45201-1159

Should you have any questions, please contact Bob Deroche at the above address or telephone (313) 226-6813. Please refer to File Number: 99-250-002-1.

Sincerely,

Richard J. Polo Jr.
Lieutenant Colonel, U.S. Army
District Engineer

Enclosures

Copy Furnished:

MDEQ, Livonia (93-14-602)

Supreme Court
JUN 15 2005
OFFICE OF THE CLERK

(5)

No. 04-1384

In the Supreme Court of the United States

JUNE CARABELL, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Army Corps of Engineers acted reasonably in interpreting the term "waters of the United States" as it appears in the Clean Water Act (CWA), 33 U.S.C. 1362(7), to encompass a wetland area that is separated from a tributary of a traditional navigable water by a narrow man-made berm, where evidence in the record reflected the presence of at least an occasional hydrologic connection between the wetland and the adjacent tributary.

2. Whether the application of the CWA to the wetland at issue in this case is a permissible exercise of congressional authority under the Commerce Clause.

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In the Supreme Court of the United States

No. 04-1384

JUNE CARABELL, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 391 F.3d 704. The opinion of the district court (Pet. App. 15a-17a) and the report and recommendation of the magistrate judge (Pet. App. 20a-57a) are reported at 257 F. Supp. 2d 917.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on September 27, 2004. A petition for rehearing was denied on January 10, 2005 (Pet. App. 18a). The petition for a writ of certiorari was filed on April 11, 2005 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners sought permission to fill a wetland in Macomb County, Michigan, in order to build a condominium complex. The United States Army Corps of Engineers (Corps) denied petitioners' permit application under the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1251 *et seq.*, and petitioners filed suit to challenge that determination. The district court granted summary judgment to the Corps and the Environmental Protection Agency (EPA). Pet. App. 15a-17a. The court of appeals affirmed. *Id.* at 1a-13a.

1. Section 301(a) of the Clean Water Act prohibits the "discharge of any pollutant by any person," unless in compliance with the Act. 33 U.S.C. 1311(a). "Discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); *see International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not naviga-

ble in the traditional sense.").[1] In *Riverside Bayview*, the Court upheld the Corps' assertion of regulatory authority, under the CWA, over "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction." 474 U.S. at 135.

In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), this Court again construed the CWA term "waters of the United States." The Court in *SWANCC* held that use of "isolated" nonnavigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172. The Court stated, however, that "it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

2. The CWA sets up two complementary permitting schemes. Section 404(a) authorizes the Secretary of the Army, acting through the Corps, or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362; 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

specified disposal sites." 33 U.S.C. 1344(a). Under Section 402, any discharge of pollutants other than dredged or fill material must be authorized by a permit issued by the EPA (or a State with an approved program) under the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1342. The Corps and EPA share responsibility for implementing and enforcing Section 404 of the CWA. See, *e.g.*, 33 U.S.C. 1344(b) and (c).

The Corps and EPA have promulgated identical regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). As it relates to this case, the definition encompasses traditional navigable waters, which include tidal waters and waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1); 40 C.F.R. 230.3(s)(1); "tributaries" to traditional navigable waters, see 33 C.F.R. 328.3(a)(5); 40 C.F.R. 230.3(s)(5); and wetlands that are "adjacent" to traditional navigable waters or their tributaries, see 33 C.F.R. 328.3(a)(7); 40 C.F.R. 230.3(s)(7). The regulations define the term "adjacent" to "mean[] bordering, contiguous, or neighboring," and they provide that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. 328.3(c); 40 C.F.R. 230.3(b).

3. Petitioners own a tract of 19.61 acres in Chesterfield Township in Macomb County, Michigan. Pet. App. 2a. One of the last large forested wetlands in Macomb County covers 15.96 acres of the property. *Ibid.* That wetland is a remnant of prehistoric Lake St. Clair, which now lies about a mile to the southeast. *Ibid.*; C.A. App. 106-107.

The property is in the shape of a right triangle. Pet. App. 2a. An unnamed ditch runs along the hypotenuse, from the southwest to the northeast corner of the property. *Id.* at 2a-3a. When the ditch was excavated from the wetland, the excavated material created a small berm running along both sides of the ditch. *Id.* at 3a. Portions of the berm obstruct surface water flow to the ditch, but the berm may be overtopped when water levels are high. *Ibid.*; C.A. App. 108, 639. The berm also contains drainage cuts that facilitate water flow from the wetland into the ditch. *Id.* at 639.

The ditch connects with the Sutherland-Oemig Drain at the northeastern corner of the property. Pet. App. 3a. The Sutherland-Oemig Drain flows into Auvase Creek, which flows into Lake St. Clair. *Ibid.* Lake St. Clair, which connects Lake Huron and Lake Erie and lies between Michigan and Canada, is a traditional navigable water. *Ibid.* At the southwestern corner of the property, the ditch connects with other ditches that in turn drain into Auvase Creek and, eventually, into Lake St. Clair. *Ibid.*

4. In 1993, petitioners applied to the Michigan Department of Environmental Quality (MDEQ), which administers an EPA-approved CWA program (40 C.F.R. 233.70; see 33 U.S.C. 1344(g)-(h)), for a permit to fill the wetland to facilitate construction of a 130-unit condominium complex. Pet. App. 3a. Both EPA and the United States Fish and Wildlife Service (FWS) filed comments opposing the application. *Ibid.* MDEQ initially denied the application, but a state administrative law judge directed it to issue a permit allowing a 112-unit complex. *Id.* at 3a-4a. Under the CWA and implementing regulations, however, EPA's continuing objection required petitioners to seek the Corps' approval as